Supreme Court of the United States

OCTOBER TERM, 1946.

Nos. 38 and 39.

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

VS.

DONNELLY GARMENT COMPANY, A CORPORATION; DONNELLY GARMENT WORKERS' UNION; AND INTERNATIONAL LADIES' GARMENT WORKERS' UNION, RESPONDENTS.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, PETITIONER,

VS.

DONNELLY GARMENT COMPANY, DONNELLY GARMENT WORKERS' UNION AND NATIONAL LABOR RELATIONS BOARD, RESPONDENTS.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENT, DONNELLY GARMENT COMPANY.

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Of Counsel.

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OPINIONS BELOW.

The opinions of the Circuit Court of Appeals (XIII, 7-64) are reported in 151 F. 2d 854. Prior opinions of the

Circuit Court of Appeals in this case are reported in 123 F. 2d 215.

JURISDICTION.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the act of February 13, 1925, and Section 10(e) and (f) of the National Labor Relations Act.

STATEMENT.

The Board's statement contains a myriad of misstatements and assumptions. Some are plain misstatements, others are misstatements in that they assume, *as established*, the findings of the Trial Examiner, which is "begging the question." To point out all these various misstatements, and the evidence in the record disproving them, would require more space and particularly more time than is available.

For example, at page 12 the Board's brief says "through two of its management representatives, Todd and Atherton, the company hired an attorney to advise its employees in opposing the ILGWU (X, 3872)." This is absolutely not supported in the slightest degree by the evidence—the Board cites no reference to the evidence but only to the Trial Examiner's finding and even that reference does not support the statement made. At X, 3872 there is no statement that the company hired an attorney nor that he was employed to advise the employees in opposition to the ILGWU. These are conclusions of counsel, and the findings at (X, 3872) are conclusions of the Trial Examiner which Respondent claims are not supported by the evidence. Todd and Atherton werre not "management representatives." Counsel's statement goes farther

even than the findings of the Trial Examiner and the Board, and is wholly unwarranted by the evidence. Throughout the statement of the case and throughout the argument, the "facts" as stated in the brief are largely based on the assumption that the Board's findings are supported by the evidence. The overwhelming evidence to the contrary is ignored. Everything that is said or done by any employee is claimed to have been done "by Respondent."

We can only ask that the court, in reading the Board's statement and argument, keep in mind these "assumptions.

Also in the "Questions Presented" 1 (a), page 2, the same assumption is made—the petitioner there assumes as a fact that an employer (Respondent) "through its supervisory staff sets up and takes a leading part in the administration of a plant union for the declared purpose of preventing the nationally affiliated labor organization from organizing its employees, * * *." That is far from the true situation here. The court is not entitled to make that assumption unless it first determines the merits and finds that the evidence *does* support the Board's findings, Respondent's contention being that it does not.

History of Proceedings.

This case has been twice before the Labor Board and twice before the Circuit Court of Appeals. The Labor Board each time found against Respondent and the Court of Appeals each time refused to enforce the Board's Order because it had failed to accord Respondent a fair trial. The Circuit Court of Appeals did not in either instance pass upon the question as to whether the Board's Order and decision was supported by the evidence. However it was Judge Riddick's view, in his concurring opinion

in the Court below, that the Court should also hold that there was no substantial evidence to support the Board's Order (XIII, 55-56).

The issue before this court is whether the court below abused its power and discretion in refusing to enforce the Board's order.

The issues made by the pleadings are summarized by the Court below as follows (XIII, 2-3):

"Briefly stated, the charges were that the Company had fostered, dominated and supported the Donnelly Garment Workers' Union an independent union of the Company's employees (which, for convenience will be called the 'plant union'), and its alleged predecessor, the 'Nelly Don Loyalty League'; that the Company had entered into a closed-shop agreement with the plant union for the purpose of assisting it; that the Company, in April, 1937, discriminatorily discharged, and had refused to reinstate, two employees, Sylvia Hull and May Fike, for joining and assisting the International.

"In its answer, the Company denied that it had engaged in any unfair labor practices, and asserted the existence, on the part of the International, of a conspiracy to force the Company, by fraud, violence and secondary boycott, to compel its employees, against their will, to join the International, and that the Board, its agents and representatives were furthering this unlawful conspiracy.

"The Donnelly Garment Workers' Union (the plant union) was permitted to intervene. It admitted in its answer that the Company and the plant union had entered into a closed-shop agreement, but denied all of the other allegations of the complaint.

"The International was also permitted to intervene, in support of the charges against the company."

The "main and controlling issue" in the hearing before the Labor Board (as stated by the Court below, 123 F. 2d, l. c. 221) was whether the Respondent, Donnelly Garment Company, coerced or interfered with its employees in the formation and administration of the DGWU or whether that organization was freely and voluntarily formed by the employees. James C. Batten, Trial Examiner, at the first hearing, refused to receive or consider the testimony of the 1,200 employees on this issue (VI, 1752). The Board affirmed the Trial Examiner's action in excluding this evidence, and in excluding evidence as to the violence, threats and other activities of the ILGWU, and other evidence offered by Respondent (A, 562) and entered its order against the Respondent (A, 620). Respondent appealed to the Circuit Court of Appeals on the grounds: (1) that the Board's order was not supported by the evidence, and (2) that Respondent had been denied a fair trial because of the exclusion of the testimony of the employees, and the exclusion of other material evidence and the bias of the Trial Examiner. The Circuit Court of Appeals upheld Respondent's contention that it had been denied a fair trial because of the exclusion of material evidence and remanded the case to the Board to "receive and consider" the excluded evidence (123 F. 2d l. c. 225). The Court said (l. c. 221, 222, 225):

> "The main and controlling issue in the case was whether the formation or administration of the Donnelly Garment Workers' Union had been supported, dominated or interfered with by the Company or whether that union was a *bona fide* independent labor organization formed and administered exclusively by the employees of the Company and completely free from employer influence, domination and support (l. c. 221). * * *
>
> "At the hearing before the Trial Examiner, the petitioners proffered the evidence of the employees

of the Donnelly Company, some 1,200 in number, to show how and why they formed the Donnelly Garment Workers' Union, to show that no influence was brought to bear upon them by the employer either in the formation or administration of the union, to show what the President of the Company had said to them at the mass meeting in the spring of 1937, to show that their freedom to organize and to choose their own representatives for the purposes of collective bargaining had not been interfered with by their employer, and to show that their union, both in its formation and administration was exclusively controlled and supported by them. The Trial Examiner refused to receive this evidence. He permitted the petitioners to make formal offers of proof (l. c. 222). * * *

"*This was not a case* where domination and support by an employer of an independent union was conceded or where the independent union was conclusively shown to be of a character which could not, in any event, act as the bargaining representative of its members. The evidence of the Board which tended to show domination and support of the independent union by the Company *was circumstantial* (l. c. 222). * * *

"It was not shown that any of the employees of the Donnelly Company whose testimony was offered was under any disqualifying disability. There was no presumption that these employees would commit perjury, and, even if the Trial Examiner believed that they would perjure themselves, that would not have affected the admissibility of their evidence. It is elementary that there is a distinction between the admissibility of evidence and its weight or sufficiency. *National Labor Relations Board v. Bell Oil & Gas Co.*, 5 Cir., 98 F. 2d 870, 871. Surely if the testimony of an employee which tends to prove that an employer interfered with or supported the organization of an independent union is admissible, the testimony of an employee which tends to disprove domination and

support of such a union by an employer is equally admissible. Evidence is relevant if it tends either to prove or disprove any issue in a case. We do not say that the Trial Examiner was required to take the same testimony from 1,200 witnesses. There were available to him well-known expedients for limiting the number of witnesses where their testimony was cumulative.

"We have no doubt that the testimony offered by the petitioners in their efforts to prove that the employees of the Donnelly Company formed the Donnelly Garment Workers Union of their own free will and that the formation and administration of that union was free from employer influence, domination and support, and to explain how and why they came to organize the union, was competent, relevant and material and should have been received. The individuals who form an unincorporated association certainly should know what sort of an organization it is, how it happened to be formed, *who influenced its formation, and who controls it.* We think there can be no doubt of the right of the members of such an organization to testify to such matters, and that their evidence is admissible regardless of its weight (1 c. 222). * * *

"Our conclusion is that the petition of the Board for enforcement of the order under review must be denied. We think that the least that the Board can do, in order to cure the defects in its procedure caused by the failure of the Trial Examiner to receive admissible evidence, is to vacate the order and the findings and conclusions upon which it is based; to accord to the petitioners an opportunity to introduce *all of the competent and material evidence which was rejected* by the Trial Examiner; and to receive *and consider* such evidence together with all other competent and material evidence in the record before making new findings and a new order" (1. c. 225).

Thereafter the Labor Board held a second hearing and again appointed James C. Batten as Trial Examiner (A, 473). Respondent objected to the designation of Batten on the ground that he was biased and prejudiced, had prejudged the employee testimony and that he had emphatically expressed his conviction that the excluded evidence was wholly worthless (A, 474-493), but the Board refused to appoint a new Trial Examiner (A, 498-502), to which ruling respondent noted its exceptions (X, 3786).

On the second hearing, Batten received the testimony of Mrs. Reed and eleven employees and then ruled that further such testimony was cumulative, which was the position taken by the Counsel for the Labor Board and the ILGWU, and refused to receive further employee-testimony (IX, 3253). He also rejected (X, 3783) all other evidence offered by respondent, including all offers of proof made at the former hearing (IX, 3265, 3270). The Trial Examiner again found against Respondent and recommended substantially the same order as in his first intermediate report. The Board adopted (A, 618) the Trial Examiner's report, of 61 pages (X, 3837-3898) verbatim, except for one minor correction (A, 620) and stated with regard to the issue of the materiality of the employees' testimony (A, 619):

> "* * * We are moreover impelled to *adhere* to the opinion, derived from our experience in administration of the Act, that conclusionary evidence of this nature *is immaterial to issues such as those presented in this case.*"

The Respondent again appealed to the Circuit Court of Appeals on the grounds (1) that the Board's second order was not supported by the evidence, and (2) that the Respondent had not received a fair trial because of

the Board's refusal on the second hearing (contrary to the Court's remand) to consider or *accord any materiality* to the employees' testimony, and because it had excluded other material evidence, and had ignored Respondent's evidence, and because of the refusal of the Board to designate a new Trial Examiner for the second hearing (A. 7-15 *et seq.*). The Circuit Court of Appeals held that the Board, at its second hearing, had denied Respondent a fair trial, for each of these reasons. We quote from the Court's holdings on these points, as follows:

1. Failure to consider employee testimony.

"It seems to us that the Company and the plant union are justified in contending that the evidence of the employees tending to show lack of domination and interference by the Company received no different or greater consideration upon the second hearing than it did upon the first, and that it was *disregarded* in both hearings" (XIII, 44).

2. Refusal of evidence of conspiracy on the part of ILGWU.

"The Company and the plant union here have at all times contended that the International, by the use of fraud and violence, was endeavoring to force the Company to herd its employees into the International, and that the charges filed by the International with the Board were not filed in good faith, but for the purpose of influencing the result of an action for an injunction brought by the Company to prevent the International from carrying out its threats. That the charges of misconduct made by the Company and the plant union against the International are not without substance is shown by the record. We think that if a further hearing were to be held, the application of the Company and the plant union to this Court for permission to adduce before the Board additional evi-

dence of the alleged misconduct of the International should be granted" (XIII, 46).

3. Exclusion of evidence as to events in 1934 and 1935.

"The Board based its findings of hostility of the Company to outside unions upon evidence of events which preceded the enactment of the National Labor Relations Act. The Company and the Plant union regarded such evidence as incompetent and immaterial, and objected to its introduction. * * * It is argued that the Company and the plant union were not permitted to introduce evidence relative to these past events which the Board contended showed anti-union sentiment on the part of the Company. This argument appears to be based in part upon the refusal of the Trial Examiner, during both the first and the second hearing, to receive evidence relative to the methods which the International, from the beginning, was using in its efforts to organize the Company's employees, and in part upon the assertion that, during the second hearing, the Examiner, over the objection of the Company, permitted the Board to examine witnesses relative to events that occurred in 1935, but refused the same privilege to the Company. The testimony specifically referred to as having been improperly received, over objection, related to the Loyalty League, which, as already pointed out, the Board contended was an instrumentality of the Company to resist the International; and which the Company and the plant union asserted was a mere social organization. * * * We think, however, that the Trial Examiner, in view of the importance which he ascribed to events preceding the enactment of the National Labor Relations Act, should have received evidence proffered by the Company on the second hearing to show the methods employed by the International to organize the employees of the Company and that the Company was not guilty of the charges of

discriminatory treatment of its employees made by the International under the National Industrial Recovery Act. We should hesitate to rule that the Trial Examiner's failure in this regard amounted, alone, to a denial of due process, but if the Company's attitude toward outside unions prior to the National Labor Relations Act was to be regarded as a matter of controlling consequence, the Company should, we think, have been afforded a full and fair opportunity to prove that its attitude was not what the International asserted it to be" (XIII, 46-48).

4. Exclusion of contracts of ILGWU.

"The Company and the plant union contend that, to refute the evidence relied upon by the Board and the International as indicating that the contracts with the plant union were a sham, evidence that contracts containing similar provisions were made by the International should not have been rejected. We know of no reason why evidence that provisions similar to those in the contracts of the International itself should not have been considered pertinent. It at least bore upon the 'imponderables' which the Board has the power to appraise" (XIII, 48-49).

5. Exclusion of evidence of Wave Tobin concerning violence used by ILGWU in Kansas City strikes and threats to employ the same methods against the Respondent and its employees.

"The Company and the plant union, in support of their claim that the employees formed their own union in order to protect themselves against violence and misrepresentation and to prevent the Company, under threat of the destruction of its business and their jobs, from herding them into the International against their will, had a right to show what methods the International was resorting to in its organizing campaign in Kansas City. Such testimony

would have substantiated the evidence of the employees that that was the reason they organized the plant union. The employees were interested witnesses whose testimony might be discounted. The testimony of those who conducted the strikes for the International could not well be disregarded" (XIII, 50).

6. Exclusion of evidence that employees such as instructors, head cutters, head pattern makers (found by the Board to be "Supervisory" employees) were eligible to membership in the ILGWU and other Labor Unions in the garment industry.

"The other offers of proof referred to, should not, we think, have been rejected. If the issues had been tried before a jury, evidence that employees holding positions similar to those of the employees who were asserted by the Board to be ineligible to union membership, were regarded by the International and other large unions as eligible to union membership, would, in our opinion, have been admissible. We do not mean that the jury would have been bound by such evidence, but that the evidence would tend to indicate that employees holding similar positions were not usually considered by employers and employees in the garment industry to be representatives of the management" (XIII, 50).

The Facts.

At the outset, Respondent calls the Court's attention to five salient facts:

(1) The DGWU was formed and maintained not by a mere majority but by 100% of the working employees of Respondent (X, 3874-5).

(2) The evidence upon which the Trial Examiner's and Board's inferences and findings are based was *circumstantial* and contrary to the direct testimony and offered testimony of all of Respondent's 1,200 employees (123 F. 2d l. c. 222).

(3) Although the Board bases many of its adverse findings on respondent's alleged "hostility to unions," the Board did not find a single instance of the discharge of an employee because of union affiliations, over the entire period of 1934 to 1942, or ever.

(4) It has been established by several decisions of Federal Courts that the complaining Union, ILGWU, its officials and agents, were at all times pertinent herein, engaged in an unlawful conspiracy and campaign of fraud and violence to compel Respondent to force its employees against their will to join the ILGWU (XII, 4187-4200; 21 F. Supp. 807; 119 F. 2d 892, l. c. 898; 55 F. Supp. 587, l. c. 594).

(5) The Respondent offered to prove that its employees were receiving higher wages and had better working conditions than employees in plants in contractual relations with the ILGWU (I, 201-207).

In order that the Court may have a fair picture of all the circumstances involved in the alleged controversy between Respondent and the ILGWU, and of the issues in the Labor Board hearings, we outline as briefly as possible the facts shown by the evidence and offers of proof:

On November 9, 1936, the ILGWU through its president, David Dubinsky, announced through the press (XI, 4185) a nation-wide drive to bring into the ILGWU all of the 90,000 unorganized garment workers in the nation. This announced program was wholly without regard to the status of wages, hours and working conditions in any particular plant. The plan was to make a clean sweep of every plant, regardless of how equitable the wages, hours and working conditions therein might be. President Dubinsky announced that the ILGWU had $4,000,000 in its treasury, and had appropriated $500,000 of it to finance the campaign. He announced that the ILGWU would open a number of new offices over the country, in-

cluding a Kansas City office for the particular purpose of concentrating on the Donnelly Garment Company. Dubinsky asserted the St. Louis office would have sufficed for Missouri except that the Union "wants to give Jim Reed a break." He explained that the wife of James A. Reed former Democratic senator from Missouri who supported Governor Landon in the campaign this year, operates the Donnelly Garment Company in Kansas City.

On February 26, 1937, Meyer Perlstein, Southwest Regional Director of the ILGWU, announced in the Kansas City press that the ILGWU plan was to send a letter to the Donnelly Garment Company within the week, demanding a collective bargaining conference; and that if the company ignored the demand, the ILGWU would send out six traveling representatives over the trade territory of the Company, threatening its customers with a boycott. Perlstein said, "Within a year we will have the plant completely organized, and as soon as we have enough members, *we will call a strike*" (III, 1019).

The public announcement by Perlstein created consternation and fear among the employees of the Donnelly plant (III, 758). On March 2, 1937, three employees, of their own accord and without the knowledge of any officer or supervisory employee of the Donnelly Garment Company (IV, 1290), circulated among the employees, and delivered to Mrs. James A. Reed a statement reading:

> "We, the undersigners, as members of the Donnelly Garment Company, wish to make it known that we are positively happy and contented with the position which we hold with this organization, and refuse to acknowledge any union labor organization. We are thankful for the real humanitarian interest extended to us by our employer, Mrs. Reed."

This statement was signed by 1,183 employees, which embraced all of the workers in the plant except three (V, 1623).

Mrs. Reed, and the officials of the Company testified that they did not know of the circulation of said statement until it was presented to Mrs. Reed at her home on the evening of March 2, 1937 (VII, 2074), and that they did not request anyone to sign such statement or obtain signatures to the same and the publication concerning same in the Kansas City Star was not at their instigation or request (VII, 2076-7, 2434).

On March 6, 1937, David Dubinsky in the course of a speech at Kansas City announced:

> "Reed (meaning the Donnelly Garment Company) will receive a polite letter within a few days inviting him to confer with Kansas City labor leaders about signing a union contract. If he refuses to meet with us we shall start our campaign" (III, 1021).

On March 9, 1937, the "polite letter" was prepared by Southwest Regional Director Perlstein, signed by himself and Wave Tobin (manager of the International's Kansas City office) and mailed to the Donnelly Garment Company. This letter set forth certain alleged "grievances" concerning which Perlstein said he would like to have a "conference" with the Donnelly Garment Company (III, 1022).

The company ignored Perlstein's letter because it was in all material respects a mass of falsehoods (V, 1599). Perlstein and the ILGWU had no authority to represent any of the employees, and the employees were protesting against the company having anything to do with them (V, 1623, 1599).

A few days later the ILGWU circulated among the Donnelly employees as they left the plant a circular containing a copy of the March 9th letter (VII, 2089).

As a build-up to the planned raid on the Donnelly plant and its employees, the ILGWU, on or about March 15, 1937, called strikes against three smaller Kansas City garment manufacturers, the Missouri Garment Company, the Gernes Garment Company and the Gordon Brothers Manufacturing Company ("Justice," April 1, 1937, V, 1523; XI, 4101-4175, incl.; IV, 1241-1275, incl.).

The ILGWU began its raids on these three companies by taking possession of the buildings where the three companies were located. Cots were moved in and mobs of non-employees carried on a program of terrorism and violence. Employees trying to get to their places of work were pulled, hauled, brutally beaten, knocked down, and their clothing stripped off. The plants were closed down (IV, 1220, 1224, 1241-1275; V, 1489; VII, 2084; XI, 4101-4175). Kansas City newspapers practically daily carried articles describing the violence engaged in by the ILGWU (XI, 4101 *et seq.*). These articles and said violence were the chief topic of conversation among the Donnelly employees and caused them great apprehension concerning their own safety (II, 553, 555).

During this period, representatives of the ILGWU made personal contact with numbers of Donnelly employees and openly boasted to these employees that the violence used in these raids was a mere curtain-raiser in preparation for the big drive on the Donnelly plant and the violence against the Donnelly Company and its employees would be even worse (I, 144; IV, 1221, 1225, 1228).

These raids were conducted by Wave Tobin, under the direct supervision of Meyer Peristein (IV, 1215-16).

She, Wave Tobin, admitted that the methods used by the ILGWU in these raids constituted the ILGWU's "normal routine activities used in organization work" (IV, 1215). Wave Tobin (in the Judge Miller injunction suit) testified as follows (IV, 1216):

> "Q. If there are any differences in the plan of campaign used in the unionization of the Gernes, Gordon and Missouri plants and the plan of campaign which you intended and still intend to follow in the attempt to unionize the Donnelly plant, please state what the differences are?
>
> A. Well in the Donnelly campaign, they intended to use more publicity.
>
> Q. That is one difference. Are there any other differences?
>
> A. None that I know of."

Meyer Perlstein testified in the said Judge Miller case injunction suit as follows (V, 1511):

> "Q. Then we may reasonably expect that these same methods used by the International at the Gordon, Gernes and Missouri strikes, whatever they were, will be continued down at the Donnelly plant, unless this Court grants a permanent injunction, is that true?
>
> A. Yes."

Meyer Perlstein, the Southwest Regional Director of the ILGWU, was in charge of the organizational and strike activities of the ILGWU in Kansas City, St. Louis, Dallas, Texas, and Memphis, Tennessee (V, 1457, 1459). Photographs, testimony, and Court records concerning the ILGWU's raids on garment companies in those cities portray the violence used by the ILGWU, including the stripping of women workers naked in the public streets, inflicting bodily injury, and other brutalities (IV, 1302, 1305). Perlstein was tried and convicted in Dallas, Texas, of having conspired to have a woman employee of the Morton-

Davis Company stripped naked in the public street (V, 1477). He served his sentence (V, 1483, 1527).

Perlstein (at this time in Dallas) made a speech, stating:

> "I believe that if the government ever dares to do what the manufacturers are doing, I will tell my sons to take up arms against the government" (V, 1478).

The ILGWU's chief officers and general executive board ratified, approved and *lauded* the tactics used in these raids. The Report of the 1937 Annual Convention of the ILGWU stated:

> "The Dallas dress strike which lasted from March until November, 1935, will occupy *a place of honor* in the annals of our union" (V, 1546).

On March 18, 1937, after the ILGWU strike at the Gordon, Gernes, and Missouri Garment Companies in Kansas City, Missouri, had begun, the employees of the Donnelly Garment Company held a meeting to discuss what they could do to protect themselves (II, 553). The meeting was called by Rose Todd, Hobart Atherton, and other Donnelly employees on their own initiative and without any suggestion or inducement on the part of Respondent or the Loyalty League (II, 555). Said meeting was held after working hours on premises not leased or controlled by Respondent (II, 453; X, 3867, note 34), but in the same building in which Respondent's plant is located. Various individual employees made suggestions with respect to defending themselves against the threatened violence. Near the end of the meeting it was suggested that Mrs. Reed be asked to come to the meeting and tell what she and the Company would do to protect the employees (II, 554, 657-8). She came and made a short talk stating that

she would do everything she could to protect the employees against violence. She further stated that it was their own business whether they should or should not join a union, but that she was not going to be intimidated by Mr. Dubinsky into forcing the employees to join the ILGWU against their will (III, 1029-31). Mrs. Reed left the meeting immediately after she finished her talk (II, 679). The meeting was attended voluntarily and the employees were not instructed to attend same by any officer, executive, or person held out by Respondent to represent, speak, and/or act for it with respect to labor matters or by any person with authority to hire, discipline or discharge employees (Ex. 1-0000, III, 759). When the second employee witness for respondent was called, the Trial Examiner ruled that no further testimony would be received relative to the March 18th meeting (II, 610d). The stenographer's transcript of Mrs. Reed's talk appears in full in Footnote 3 to the opinion of the court below (XII, 31-32).

We quote herewith the last three paragraphs which contain the parts of her speech to which the Labor Board takes exception:

> "I know you are thinking about the threats of violence that the Union is making against you and the company. I want to say that the Company and I intend to do everything possible to protect you in case of any violence. We are now trying to make arrangements with the street car company for its busses to go to certain points and pick you people up and bring you to the plant. We will let you know about this as soon as arrangements can be made.
>
> "Many of you have been here for a number of years and you know that you have never been asked whether or not you belong to a union. The company has not discriminated against anyone on that account

and Mr. Dubinsky is not going to make me discriminate against employees because they would not belong to his Union. If you want to belong that is your own business and it is up to you to decide. I will say that neither Dubinsky or any other buttinsky is going to intimidate me or the Company into forcing you to join the International Union against your will.

"I can't say at this time what will be done to protect you against violence, but the company's attorneys will consider what legal steps might be advisable. In any event, you can understand that the company will not submit to any unlawful attacks lying down."

Several days after this meeting a group of employees called on the Director of Police of Kansas City and appealed for protection (II, 585).

Shortly thereafter Rose Todd, Hobart Atherton and Sally Ormsby, after informal conversations with other employees, consulted the law firm of Gossett, Ellis, Dietrich and Tyler of Kansas City for advice. Mr. Frank E. Tyler of that firm discussed the advisability of an injunction suit and requested a retainer fee of $500 (II, 555-6).

Knowing the view of the other employees the committee decided to borrow sufficient money to pay Mr. Tyler's retainer fee and other expenses which might arise (II, 557). Rose Todd explained the facts to Mr. Ed Swinney, president of the First National Bank of Kansas City, Missouri (II, 718v), whom she had known for a long period of time. The bank loaned her $1,000 which was evidenced by a promissory note executed in the name of the Loyalty League by Rose Todd. The undisputed testimony is that Rose Todd merely used the name of the Loyalty League as a matter of convenience, and was never authorized by the Loyalty League to borrow the money in its behalf (I, 251). The undisputed testi-

mony further shows that after making the loan Rose Todd, Hobart Atherton and other employees, at a meeting of employes on March 30, 1937, requested and received contributions of fifty cents each from substantially all of the employees and turned said monies over to the treasurer of the Loyalty League to apply on the said loan (I, 250; II, 586-8, 599). However, said monies so raised were slightly in excess of Mr. Tyler's fee and the excess amount was later used for the payment of rental on chairs used by the employees at meetings which were wholly distinct from the Loyalty League (I, 282a). There is not a scintilla of evidence that respondent paid or contributed directly or indirectly one cent to the payment of Mr. Tyler's fee; or paid or contributed one cent to the Loyalty League during its entire existence (II, 378bb); or paid or contributed one cent to employees for the purpose of holding any meetings or taking any action with respect to the ILGWU or any other labor organization (II, 489-490). Nor had Respondent or any of its officers had any knowledge concerning the loaning of said $1,000 or of the giving of said note until the same was disclosed in Court.

Meanwhile the Gernes, Gordon, and Missouri Garment Companies strikes were continuing and Meyer Perlstein in an article in the publication styled "Justice," being the official publication of ILGWU, made this statement concerning the three companies:

> "These three firms will soon have union shops. If not, they will never again manufacture dresses" (V, 1492).

On or about April 12, 1937, this Court sustained the National Labor Relations Act. After this decision, Mr. Tyler discussed with employees the advisability of the

employees forming a plant union for their own protection (I, 61, 64-5; II, 558-9).

On or about April 22, 1937, an article appeared in the Kansas City press, to wit:

"Donnelly Worker Will Be Sent To Union Convention.

Garment Organization Seeking Support for Strike at Plant

Sylvia Hull, an employe of the Donnelly Garment company, has been named a delegate from Kansas City to the International Ladies' Garment Workers Union biennial convention, May 3 at Atlantic City, Meyer Perlstein, regional director, announced Thursday.

The Donnelly worker, according to Perlstein, was one of a committee from that garment company who appeared Wednesday night before a joint group representing various Kansas City locals and requested representation at the national convention.

Perlstein said the Donnelly committee desired one of their number to appear at the convention and ask the International body to indorse and support a strike against their employer for failure to negotiate a contract for higher wages, shorter hours and improved conditions. The Kansas City joint committee, Perlstein asserted, agreed to pay all expenses of the Donnelly delegate" (III, 1015).

This notice caused considerable ill-feeling among the employees because Sylvia Hull had not been authorized to represent them. Sylvia Hull, in the Judge Miller Case, testified that she was called to a hotel by Perlstein and asked if she would go to Atlantic City, New Jersey, to attend the ILGWU's convention; that no committee of Donnelly employees had asked her to represent them; that she did not know at the time of any ILGWU member

in the Donnelly plant except one girl. She further testified that nothing was said about calling a strike at the Donnelly plant for failure to negotiate a contract for higher wages, shorter hours, and improved conditions. She further testified that the article was given to the press for publication (V, 1555-1563).

On the morning following the publication of the aforesaid article, there was a spontaneous demonstration by the employees against Sylvia Hull on account of said statements in the paper. She was not harmed or touched and voluntarily went home (II, 536).

Thereafter, within a few days, Sylvia Hull went to Atlantic City, New Jersey, and attended the convention of the ILGWU. The ILGWU paid her expenses (V, 1565). At the convention, she delivered a speech containing false and malicious statements concerning respondent and requested the convention to vote funds to support a strike at respondent's plant, the said speech being written by someone whom Sylvia Hull could not identify (V, 1569-1574).

Mrs. Hyde, employment manager of respondent, attempted repeatedly to reach Sylvia Hull on the telephone on instructions of Mr. Baty but was unable to do so. Sylvia Hull admitted that she never communicated with respondent after her return from Atlantic City, New Jersey, but went to work at once for the ILGWU as a paid organizer (V, 1564-5). She even testified that she did not desire to return to the Donnelly plant except under union conditions, meaning a closed shop under the ILGWU (V, 1580). The Board was compelled to find that under all the circumstances that respondent did not refuse to reinstate her within the meaning of Section 8 (3) of the Act.

On or about April 27, 1937, approximately 100 per cent of respondent's employees, with the exception of

officers, executives and supervisory employees with the authority to hire, discipline or discharge, voluntarily, without pressure, suggestion or inducement, directly or indirectly, on the part of the company, its officers, executives or any persons held out by respondent to represent, speak for, or act in any manner for it with respect to labor matters, or any persons with authority to hire, discipline or discharge (I, 194-196), attended a meeting of employees called by the employees after working hours on premises not leased or controlled by the Donnelly Company, and after discussion by numerous employees of the threatened violence of the ILGWU and of the attempt of Sylvia Hull and the ILGWU to represent them without authority and after a talk by Mr. Tyler, their attorney, regarding their rights under the National Labor Relations Act, freely and voluntarily voted unanimously to organize a labor union and to name it Donnelly Garment Workers' Union. They also unanimously elected officers and a bargaining committee (I, 54-59; II, 558-561).

The employees decided on this action for their own protection and no official, executive, or supervisory employee of Respondent with authority to hire, discipline, or discharge, or any person held out by Respondent to represent, serve, and or act for Respondent with respect to labor matters was present at said meeting or at any other meeting of said DGWU, nor at any time suggested, advised, influenced, or instructed the employees to organize or maintain a union (I, 191, 194-5; KK, 561). The Respondent has never directly or indirectly made contribution to said union, financial or otherwise (I, 230; VII, 2094). All meetings of the DGWU were held outside of working hours (VIII, 2752, 2939, 2987; X, 3605, 3709, 3713, 3720, 3724, 3729, 3734, 3740, 3742, 3745, 3754, 3764, 3767-68-69; 3770).

The Board's witness, Mrs. Weilert, testified (X, 3605): "We got off at the early time, 10 after 4, and the meeting didn't take up until 5, the regular meeting." Up to the latter part of May, 1937, the meetings were held on property not belonging to or controlled by the Company, and after said date, the Union paid rent to the Company for the space in which it held its meetings. (I, 130-131, 227; X, 3867, note 34).

The following day, Rose Todd, who had been unanimously elected chairman of the bargaining committee, took the union's membership cards to Mrs. Reed and advised her of the action of the employees in unanimously organizing a labor union and in unanimously selecting a committee to bargain with respondent concerning the terms and conditions of their employment (I, 196-7). Rose Todd stated that Mrs. Reed said that petitioner would give consideration to proposals of the DGWU (I, 80a-80c). Mr. Tyler, attorney for the DGWU, commenced to draft a contract to present to respondent (I, 89).

The committee asked Mr. Baty, plant manager of Respondent, to furnish it with certain information for use in preparing the proposed contract (I, 197). On May 27, 1937, a proposed draft of contract was presented to Mrs. Reed. She conferred with Mr. Baty, plant manager, Mr. Keyes, sales manager, and with Senator Reed and Mr. Ingraham, attorneys for the Company, and several others, concerning the proposed draft (I, 85). A number of modifications were made in the hand writing of Senator Reed (XI, 4105-4123; VII, 2100-2110) and the modified draft was then taken up with the committee and Mr. Tyler, its attorney; the contract was fully discussed as so changed, and further modifications were made. When finally satisfactory to the parties it was executed (VII, 2108-9). It provided for a minimum wage, 8-hour day and 40-hour week.

promotion and seniority rights, recognition of the union as the sole bargaining agency for the employees, procedure concerning complaints and grievances, meal period, closed shop, lay offs, time spent by general chairman on union matters, arbitration, strikes, stoppage and lock-outs, employer's right to reduce number of employees and discharge employees for business reasons and not for union affiliations, vacations, privilege of continuing sick, accident and group life insurance previously contracted for, maintenance by respondent of two trained nurses and hospital room at plant (Board's Ex. 6, III, 807). After further negotiations, extending for a period of approximately thirty days, a supplemental contract was entered into on June 22, 1937, covering rates of pay and classifying employees into groups and providing absolute minimum wages for the respective groups (Board's Ex. 7, III, 812). These minimums ranged from $16.50 to $42.50 for the various kinds of work. The lowest minimum wage for any employee, even bundle boys or messenger boys, was $16.50 per week. Said contracts provide for more favorable wages, rates of pay, and other conditions of employment than are contained in any contracts entered into between the ILGWU and other garment manufacturers in the house dress and wash frock industry (V, 1429-1456). The terms and conditions of said contracts have at all times been fully complied with and all complaints thereunder have been adjusted by the parties (I, 234-238a).

In the latter part of May, 1937, Perlstein gave out another public statement in the Kansas City papers. This time he announced that the ILGWU's campaign against the Donnelly Garment Company would be opened with advertising through the press and over the radio, urging a boycott of Donnelly by retailers and consumers. He announced that six girls were being specially trained to

visit all retailers selling Donnelly products (of whom there are 1,800); that these six agents would travel from coast to coast, urging a boycott. He announced that if the retailers refused to accede to this boycott demand, their stores would, in turn, be picketed; that is to say he threatened a secondary boycott. He announced that "we are ready to spend $250,000 to accomplish our goal, and that amount is ready" (V, 1525, 1503-1507).

On June 9, 1937, the ILGWU ran full page advertisements in the Kansas City papers addressed to the Donnelly Garment Company. The gist of these advertisements is summarized in these excerpts:

> "As practical business people, you, we take it for granted, realize that, whatever your feelings for the moment may be, you will eventually have to carry on collective dealings with the International Ladies' Garment Workers' Union, which cannot, should not and will not permit one individual employer to segregate himself from the rest of the industry in matters of work conditions and other fundamentals of employment. * * * It still lies within your choice to avoid a conflict which may prove as costly as it appears futile at this stage, to all sides involved in it. Your readiness to meet us in this endeavor in a spirit of industrial statemanship, rather than in that of guerilla warfare, will be applauded by every constructive factor in the entire dress industry, and by the industry, in general, the country over" (V, 1543-4).

By this time the ILGWU's six representatives were traversing the country, urging retailers to boycott Donnelly products, and threatening, if they refused, to conduct a secondary boycott of the retailers themselves, and to picket their stores. These women were traveling over many states, including Florida, Georgia, Alabama, Mississippi, Kentucky, Tennessee, Kansas, Missouri, Ohio and Indiana (V, 1497-1505).

These traveling emissaries distributed many thousand printed circulars (V, 1504). On the cover of the circular in large type was the legend: "WE DO NOT PATRONIZE NELLY DON DRESS." The circular contained a number of false statements, such as these: (1) that the Donnelly Garment Company's "wage scale is far below that prevailing everywhere else in the industry"; (2) that the Donnelly plant uses the "speed-up system"; and (3) that most of the Donnelly workers are constantly in "a state of exhaustion and fatigue," requiring "constant medical attention because of the nervous strain imposed upon them by this system" and that "numerous workers suffer complete nervous breakdowns" (IV, 1183-1189).

The falsity of the above statements appears from the uncontroverted testimony of the employees of the Donnelly plant and by a comparison of the Donnelly contracts with the contracts of every manufacturer in Kansas City with whom the ILGWU has a contract (VI, 1653-1674), findings of Federal Courts (V, 1616d-1616h; 21 F. Supp. 807; 55 F. Supp. 1. c. 594),

The trial examiner received in evidence voluminous portions of testimony taken in an old NRA Case relating to matters alleged to have occurred in 1934, some five years prior to the issuance of the complaint herein. Respondent objected to the introduction of said testimony for the reason that the alleged occurrences were so remote in point of time as to be immaterial and were irrelevant because they occurred prior to the effective date of the National Labor Relations Act (III, 1110a; IV, 1336).

Subject to such objections, the parties stipulated (III, 740) that the testimony taken in said NRA hearing and in the injunction hearing before Federal Judge Andrew Miller, might be introduced in the Labor Board hearing. The Trial Examiner overruled Respondent's objections.

However, the Trial Examiner qualified his ruling (A, 509) to the effect that "acceptance of the evidence is not intended to * * * reverse rulings heretofore made with respect to the introduction of evidence upon certain subjects," thereby depriving respondent of the benefit of such testimony favorable to it. He refused to clarify or change this ruling (A, 463-4, 467).

The undisputed evidence shows that in 1934, the fifteen employees named in the NRA complaint were part of a group of 295 employees laid off by respondent because of a drastic drop in business. Respondent did not know of their union affiliation at the time of such layoff (V, 1600). Eight of these fifteen employees were recalled when business picked up in the fall of 1934 (VII, 2072; IV, 1158-60; V, 1600). Six of the other seven testified in the NRA case. All except one testified that at the time of their layoff they were not members of the ILGWU and the one who was a member kept it secret and the Company did not know it (V, 1600). Three claimed discrimination because they were transferred to an auxiliary plant operated by respondent at 26th and Walnut, which they thought was not nearly so nice as the main plant (IV, 1130d). On cross-examination they admitted they had worked at the auxiliary plant long before they even thought of joining the union (IV, 1134-5, 1127). One of said witnesses claimed that she was discriminated against because she had once or twice had to match shades of material (IV, 1126s).

The NRA case was never decided as the Supreme Court held the National Recovery Act unconstitutional before the trial was finally terminated.

The Examiner in Note 25 to his Intermediate Report states (X, 3860):

> "The undersigned makes no findings with respect to the reasons for these discharges which occurred

prior to the effective date of the Act—and which are not presently in issue."

The sole and only issue involved in the said NRA proceeding was whether or not respondent had discharged the complainants on account of their union affiliation.

The Examiner recognizes the impropriety of passing upon the alleged discharges in 1934 (X, 3860, foot-note 25), but in the next breath holds that respondent was guilty of discrimination in 1934 (X, 3863), and thereon finds respondent "hostile to unions."

The Board finds the Nelly Don Loyalty League, which was organized in 1935, to be the predecessor of the DGWU (X, 3873), and that the Respondent used the Loyalty League in the formation of the plant union (X, 3886). The testimony and offered testimony of all the employees is that the Loyalty League was purely a social organization, that it never performed any of the functions of a labor union nor did it ever seek to do so; that it did not exact dues from its members or hold regular meetings; that it had no connection with the DGWU and continued to exist after the formation of the DGWU; that it did not assist or participate in any way in the formation or maintenance of the DGWU; and there is no evidence that the Respondent or any of its officials, exerted or attempted to exert any force or coercion upon the employees through the Loyalty League to promote the formation of the DGWU; that the Loyalty League and the DGWU have always been wholly distinct and separate, with wholly distinct purposes (I, 187; II, 561, 622, 643, 652, 676, 678-678a; VIII, 2581-2, 2632, 2718, 2727, 2777-8, 2860, 2979; IX, 3011, 3052, 3090, 3129-30, 3196, 3362-3; III, 743, 764).

The Board finds that the instructors, thread girls, Hobart Atherton and certain other employees had supervisory authority (X, 3854, 3858-9). The overwhelming

testimony was to the contrary (VII, 2117-18; VIII, 2584, 2586-7, 2731, 2779, 2861, 2864, 2934-5, 3000; IX, 3019-20, 3046, 3059-60, 3078; 3092-3-4, 3097, 3122, 3136, 3195, 3206-7-8). Respondent offered to prove that employees in ILGWU plants occupying the same or similar positions were members of the ILGWU and that such employees were not regarded as supervisory employees but were eligible to membership in the ILGWU and other garment unions (X, 3787-3792). The Trial Examiner refused to receive this evidence (X, 3782-3). The testimony showed that the instructors had no authority to hire, discipline, discharge, or exercise any supervisory authority over other employees but that their work was merely to show the operators how to perform the various sewing operations, based on complete written instructions prepared in the general office (II, 391-2, 450-1; VII, 2120). The Labor Board found that Respondent had a checkoff agreement with the DGWU (X, 3880). The undisputed evidence was that the DGWU asked the Respondent to agree to a checkoff and that the Respondent refused to do so (I, 226-7, 131-2, 283; VII, 2413, 2387-8). Later, the individual employees requested Respondent to check off their dues and Respondent thereafter did so with respect to those employees who individually requested such action in writing (I, 234-5, 276-7).

The Board finds Respondent agreed to a closed shop. The evidence shows that Mrs. Reed did not want a closed shop at first (VII, 2387), but the DGWU was demanding a closed shop and Mrs. Reed yielded on condition that it should not interfere with her choice of the hiring of employees (VII, 2097).

Finally, the Board finds that typewriters, mimeograph machines, desk, and other minor facilities or equipment belonging to Respondent had been used by officers of the DGWU (I, 59-60, 108). It is the undisputed evidence that

Respondent did not know of the use of any of the aforesaid facilities and equipment, and never at any time consented to the use of the same (I, 62, 62a; II, 406-7, 411, 431, 468-9; VII, 2113, 2115).

The Board in its amended complaint charged that petitioner had discriminatorily discharged two employees, May Fike and Sylvia Hull on account of their union affilations. (In a prior amended complaint, Par. 4A, it had charged that respondent had discriminatorily discharged 18 other named employes (A, 423), but later (on respondent's motion, Ex. 1-TTT, A, 428), dismissed those charges as to all 18 employes (A, 506).) The Board in its original decision dismissed the charge as to Sylvia Hull but found the company guilty of refusing to reinstate May Fike on account of her union affiliations. The Board in its last decision, found that neither Sylvia Hull nor May Fike was entitled to reinstatement (X, 3890, 3892).

The respondent and intervener DGWU repeatedly requested the Labor Board and Trial Examiner to hold a secret election, if there was any question as to the free choice of the employes, but the Board and Trial Examiner refused to do so (A, 395, 409-414, 560).

The circumstances leading up to the filing of the Labor Board Complaint herein are enlightening.

Respondent, on July 5, 1937, had instituted an injunction suit against the ILGWU, its agents and officers, in the United States District Court for the Western Division of the Western District of Missouri, under the Sherman Anti-Trust Act, to enjoin the Defendants from continuing the conspiracy and campaign of fraud, threatened violence, and secondary boycott against Respondent for the purpose of compelling Respondent to force its employes into the ILGWU (A, 390). In this suit respondent alleged that the ILGWU and its agents were engaged in the unlawful acts hereinabove referred to.

A trial was had commencing November 1, 1937, before three United States federal judges. The Honorable Arba S. VanValkenburgh, Circuit Judge, and the Honorable Albert L. Reeves, District Judge, found in favor of respondent and the Honorable Merrill E. Otis found in favor of the defendants on the technical ground that the provisions of the Norris-La Guardia Act had not been complied with. However, Judge Otis stated: "An overwhelming showing, justifying an injunction under the law as it was, certainly has been made." 21 F. Supp. 807, l. c. 831.

The Supreme Court of the United States held that the case was not properly a three-judge case and remanded the same for a new trial. 304 U. S. 243, 82 L. Ed. 1316 (A, 390-1).

A short time prior to the new trial before a single District Judge the Regional Director of the Labor Board requested a conference on the matter (V, 1595).

Conferences between the Labor Board, respondent, the representatives of the DGWU and the ILGWU were held (V, 1385-1409, 1595). Representatives of the Labor Board advised respondent that unless it acceded to the demands of the ILGWU a complaint would be filed, and long and expensive hearings would be held (V, 1406).

The Regional Director of the Labor Board requested the Respondent, the ILGWU, and the DGWU to put their proposals in writing (V, 1409). This was done on February 4, 1938 (V, 1606-1616).

As one of the requirements of the ILGWU for a settlement was that Respondent should agree not to recognize a plant union (V, 1607), the Respondent was unable to accede to the demands of the Labor Board and ILGWU, as compliance therewith would be a violation of the National Labor Relations Act. The ILGWU in its written proposal

demanded the disestablishment of the DGWU and agreed that it would

> First: To cease all activities of every kind and character which tend to keep anyone from purchasing any of the products of the Donnelly Garment Company, *so long as the Donnelly Garment Company does not recognize any plant union* as the bargaining representative of its employees (V, 1607).

Said proposal required respondent to violate the plain terms of the National Labor Relations Act and to deny their employees the right guaranteed by the law to designate their own representatives for the purpose of collective bargaining.

Respondent advised that it could not legally and lawfully accept the proposal of the ILGWU (V, 1615-16).

On March 21, 1939, the trial of the injunction suit was commenced before the Honorable Andrew Miller, United States District Judge (A, 394), and shortly thereafter the Labor Board filed its written complaint against Respondent.

Upon a full hearing of the case, Judge Miller found in favor of the Respondent on all points (V, 1616a-1616j) and on April 27, 1939, granted a permanent injunction against the Defendant (V, 1616k). The Regional Director of the Labor Board was in close touch with the trial and on learning of the result adverse to the ILGWU, the Regional Director *on that same day*, April 27, 1939, filed an amended complaint against Respondent (A, 374) and the Labor Board proceeded to a hearing thereon.

The Injunction Case was appealed by the Defendants to the Circuit Court of Appeals for the Eighth Circuit and while the case was pending on appeal, this Court decided the case of *Apex Hosiery Co. v. Leader*, 301 U. S. 501, dealing with suits under the Sherman Anti-Trust Act. On

the strength of that decision the Circuit Court of Appeals held that Judge Miller did not have jurisdiction to grant an injunction under the Sherman Anti-Trust Act, but remanded the case to the District Court where the petition was amended so as to allege diversity of citizenship and a further trial on the merits was later held before Judge Nordbye in 1944. Judge Nordbye in his opinion severely castigated the Defendants for their unlawful acts but declined to issue an injunction, for the reason that a period of seven years had elapsed since the acts complained of were committed and because he believed a sufficient showing had not been made that the police officers were unable to furnish protection against the threatened violence (55 Fed. Supp. 587, l. c. 594, 596-7). One federal court after another found that the violence, fraud, and boycotts were committed as charged. The three-judge court so found; Judge Miller so found; the Circuit Court of appeals held that Judge Miller's findings of fact were "sustained by substantial evidence" and except for lack of jurisdiction under the holding in the Apex Case, "the decree with some modifications should be affirmed" (*ILGWU* v. *Donnelly Garment Co.*, 119 F. 2d 892, 898). And, finally, Judge Nordbye held (55 F. Supp. l. c. 594):

> "But that the strikers were the instigators of violence on frequent occasions cannot be gainsaid. The employees who wished to work were beaten and their dresses torn. They were disgracefully treated. * * * That Perlstein knew of and condoned the violence is evident * * *. The same observation may be made with reference to Wave Tobin. * * * Much space might be used in reciting the specific acts of violence and other circumstances which occurred in the strikes referred to, and the *severest condemnation* of the tactics approved or condoned by Perlstein and Tobin *is entirely justified.*"

SUMMARY OF ARGUMENT.

Respondent's brief is divided into two parts. Part One deals with the grounds upon which the court below based its decision, to-wit, that the Board denied respondent a fair trial and due process. Part Two deals with the merits, *i. e.*, that the Board's order is not supported by the evidence—a question not passed on by the court below.

PART ONE.

The decision below should be affirmed for the following reasons:

I. The Court below, in refusing to enforce the Board's order, did not abuse the power and discretion vested in it by Congress.

(a) The Court was "not in error" in ruling that the Board should have received and considered the offered evidence.

The Board, at the first hearing, refused to receive or consider the testimony of respondent's employes (some 1,200), as to how and why they formed the plant union (DGWU) and that they did so voluntarily, without any coercion or interference by respondent. The court below, on the first appeal, held this testimony material, and remanded the case to the Board to receive *and consider* it. The Board received some employe evidence at the second hearing, but *refused to accord any materiality to it, thereby flaunting the court's mandate.* The court held on the second appeal that this evidence "received no different or greater consideration upon the second hearing than it did upon the first, and that it was disregarded in

both hearings." Respondent contends that the court was "not in error" in so holding.

The Board, at both the first and second hearings refused to receive or consider several different types of evidence offered by respondent and the DGWU. The Court held that this evidence was material and should have been received and considered by the Board. Respondent contends that the court was "not in error" in so holding.

By reason of all the foregoing, the court held that respondent had been denied a fair trial and due process and refused to enforce the Board's order. Respondent contends that the court was "not in error" in so ruling, and that its decision should not be disturbed by this court, in the absence of an abuse of discretion.

(b) The Court was "not in error" in ruling that the Board should have designated a different Trial Examiner for the second hearing.

(c) In any event, the Court's rulings were not so completely wrong as to constitute an abuse of the Court's judicial power and discretion.

PART TWO.

The decision below should be affirmed because the Board's order is not supported by any substantial evidence:

"A."

The *direct* evidence is *overwhelming* that Respondent's employees formed and operated the DGWU of their own free will and accord without any coercion or interference by Respondent.

"B."

The circumstantial evidence of the Board is contrary to the overwhelming direct testimony and does not support the Board's findings and conclusions.

Under this heading, Respondent discusses the principal findings upon which the Board's order is based, to-wit:

The March 18th meeting was a voluntary employee-activity to consider means for protecting themselves against threatened violence by the ILGWU and was not promoted or participated in by respondent or the management, and that Mrs. Reed's talk at said meeting, at the request of the employes, was not coercive and well within the constitutional right of free speech.

The instructors, "thread" girls, Rose Todd, Hobart Atherton, and others, whom the Board finds to be "supervisory employes" were not such, were not held out as such by respondent nor considered as such by the employes, and their duties were not of a "supervisory" nature, they had no power to hire, fire, promote, or speak for the management in labor union matters, and did not do so, but were eligible to membership in a union and their activities were all on behalf of themselves and other employes as such and not for the management.

The Loyalty League was a social organization, and in no sense a labor organization, and was not used by respondent as a means of coercing the employes in union matters (as the Board finds).

The "March 2d statement" was conceived by two girls in the order filling department, prepared and circulated by them and by one other girl who heard of it, among the employes on March 2, 1937, without the knowledge or consent of respondent or the management, and was a purely voluntary activity on the part of the employes and not chargeable to respond-

ent, and was a legitimate employe-activity, under the terms of the National Labor Relations Act.

The respondent had no part in the organizational meeting of the plant union (DGWU) on April 27th, and did not interfere in any way with the employes in the forming or joining of that union.

The Board cites the occasional use of a company typewriter, ditto machine, etc. by officials of the DGWU in its work. Such use was without the knowledge or consent of respondent or its officials and was inconsequential in nature, and did not constitute any domination or interference by respondent.

The Board finds that respondent dominated the DGWU by promptly recognizing it and dealing with it as bargaining agency for the employes. This was respondent's express duty under the Act, as the union represented not merely a majority but virtually 100% of its employes and was demanding recognition; and the bargaining was not unduly hasty in any event.

Respondent by agreeing with the DGWU to a closed shop did not dominate or interfere with the rights of its employees, as they requested the closed shop through their union, and they all belonged to the union making such request.

The respondent did not violate the Act or interfere with or dominate its employes by virtue of the appointment by the union of Rose Todd, Mrs. Nichols and Miss Spalito on the committee to fix piece-work prices, as the union made such appointments, as they had a right to do, and respondent had no right to dictate whom they should appoint, or to interfere in any way therewith, and did not.

The demonstrations by employes against Sylvia Hull and Fern Sigler, co-employes, on April 23d, 1937, were voluntary demonstrations by the employes, due to misrepresentations that Sylvia was representing the Donnelly employes at the ILGWU convention in Atlantic City; respondent had nothing to do with initiating or encouraging the demonstrations.

but quelled same as quickly as possible and sent the employes back to work; Sylvia Hull volunteered to go home, and she never sought to return, although asked to do so by respondent. Respondent is not chargeable with said demonstrations.

The Board's findings as to respondent's alleged "hostility to unions", are not supported by the evidence.

The Board's order to reimburse employes for dues checked off is not supported by the evidence. The union asked for a check-off arrangement and respondent refused it. Later, at the individual requests of employes, respondent checked off their individual dues. The respondent did not seek the check-off, and under the circumstances here shown, the Board's order is punitive, not remedial, and the check-off is proper in any event, as the DGWU is the *bona-fide* choice of the employes.

The Board's findings are based on conjecture, speculation and far-fetched inferences from tenuous circumstances, contrary to the overwhelming direct evidence, and made in total disregard of respondent's evidence, and hence do not rise to the stature of substantial evidence.

The Board's findings, conclusions and order are contrary to the authorities.

The decision of the court below should be affirmed for the reason that the Board's order is not supported by the evidence.

ARGUMENT.

PART ONE.

I.

The Court Below Did Not Abuse Its Power and Discretion in Refusing Enforcement of the Board's Order.

In *National Labor Relations Board v. Indiana and Michigan Electric Co.*, 318 U. S. 9, this court said (at p. 28):

> "But courts which are required upon a limited review to lend their enforcement powers to the Board's orders *are granted some discretion* to see that the hearings out of which the conclusive findings emanate *do not shut off* a party's right to produce evidence or conduct cross examination material to the issue. * * * Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard *and weighed*."

and at p. 16:

> "Thus, in order to decide this case in favor of the Board we would have to hold not merely that the evidence of dynamiting would be a matter of indifference in our view of the case, but that the court designated by statute to exercise discretion in the matter and which desired to know the facts about it before passing on the sufficiency of the evidence and the impartiality of the examiner and which thought the finder of the facts should hear and consider such evidence, must *not only have been in error* but must *also have abused* its judicial discretion."

The foregoing ruling is applicable here.

Here, the court below found that the excluded evidence was *material*, that the "employee" testimony "received no different or greater consideration upon the second hearing than it did upon the first and that *it was disregarded in both hearings*" (XIII, 44), and that a different Trial Examiner should have been designated for the second hearing.

These are findings of "fact" or at least mixed findings of fact and law. Upon these findings and under the *Indiana and Michigan case, supra*, the decision of the court below should not be reversed unless the Court below "not only is in error" but also unless the bases of its decision are so utterly groundless that it has "abused its judicial power and discretion."

Neither of such conditions exists here:

(a)

THE COURT BELOW WAS "NOT IN ERROR" IN RULING THAT THE BOARD SHOULD HAVE RECEIVED AND CONSIDERED THE PROFFERED EVIDENCE.

The Court below bases its decision as to the exclusion of evidence on the Board's refusal to receive and consider evidence as to *six different* matters (XIII, 40-50).

This Court's ruling in the *Indiana and Michigan case, supra* (l. c. 16), would apply if only *one* material class or item of evidence had been excluded by the Board. We submit that the Court below was right as to all six classes. Each of these types of evidence was directly relevant and material to some phase of the case as to which Board made findings adverse to respondent. We briefly discuss the various types of evidence which the Board failed to receive or consider:

(1) Refusal of Board to consider as material the employees' testimony, as directed by the Circuit Court of Appeals in its former decision.

The Court below in its previous opinion (123 F. 2d 215) held that the testimony and offered testimony of the "1,200 employees" of respondent (III, 743-763), as to "how and why" they came to form and join the Donnelly Garment Workers' Union and that they did so freely and without any domination, coercion or interference by the employer, was competent and *material* testimony and should have been received *and considered* by the Board.

In *N. L. R. B.* v. *Indiana & M. E. Co.*, 318 U. S. 9, this Court said (l. c. 28):

> "The statute demands respect for the judgment of the Board as to what the evidence proves. But the court is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence *which might impeach*, as well as that which will support, its findings, is heard and *weighed*."

In *Rait* v. *Federal Land Bank*, (C. C. A. 8) 135 F. 2d 447, the Court said, concerning the obligation resting on a conciliation commissioner to consider evidence (l. c. 451):

> "* * * it does impose upon him the obligation to *consider fairly* and to weigh *all* the competent evidence offered * * * and *not arbitrarily ignore* or to reject such evidence."

The same Trial Examiner, James C. Batten, who conducted the first hearing, was designated by the Board to conduct the second hearing. Respondent objected strenuously to Batten's designation, for the reason that Batten had prejudged this evidence against Respondent and had expressed so emphatically at the first hearing his

conviction that this testimony was entirely worthless, that it was apparent that he could not fairly evaluate it or in fact give it any weight or consideration. The error of the Board in refusing to designate a different Trial Examiner for the second hearing is discussed herein under I(b), *infra*, but attention is called to this fact, here, as it obviously has an important bearing on this question as to whether the Trial Examiner and Board failed to consider the employees' testimony.

Batten, on the second hearing, received the testimony of some 11 employee witnesses, when counsel for the Board objected to further employee testimony. Thereupon this colloquy took place (IX, 3251-2-3):

> "Trial Examiner Batten: * * * Now, Mr. Ingraham, what is the position of respondent, that is, with respect to employee witnesses?
>
> Mr. Ingraham: Well, we are preparing to continue offering testimony of employee witnesses.
>
> Trial Examiner Batten: To what extent?
>
> Mr. Ingraham: Well until your Honor—
>
> Trial Examiner Batten (interrupting): Well, until I stop you, is that it?
>
> Mr. Ingraham: Yes (p. 3251). * * *
>
> Miss Weyand: I quite agree with the Trial Examiner's view that enough witnesses have been heard to get a fair sampling of what is the view of the employee witnesses which the Company has offered, and what they have testified to. I think that further witnesses are unnecessary, especially when considered in connection with the number of witnesses whose testimony appeared in the record before we started the hearing on the remand (p. 3252).
>
> Mr. Langsdale: Well, it occurs to me that nothing could be added to the view of the Respondent, or the Intervener either by witness after witness * * * and the testimony of each one of them is about the

same. Now what can be gained by putting on 11 more or 100 more or 200 more, I don't see. Of course, that is their problem.

Trial Examiner Batten: Is there anything further? Well if not I think I shall rule at this time that as far as the offers of proof are concerned, and the employee witnesses are concerned, with respect to the respondent, that I have heard sufficient; that anything further would be cumulative, and any addition wouldn't enable the Examiner or the Board or the Circuit Court to get any better picture of the entire situation, the light of the entire hearing, the entire record and exhibits" (p. 3253).

Respondent and Intervener DGWU offered to prove by all members of the DGWU that there was no coercion by Respondent (Board's Exh. I-0000, III, 743-758; I-RRRR, III, 764-781; I-XXXXX, X 3829-34; IX, 3290, 3265). Later Respondent made an additional similar offer of proof (Board's Exh. I-VVVVV, X, 3792) of employee testimony, which the Trial Examiner also rejected (X, 3783).

Testimony Not Considered "In Good Faith."

We do not argue that all 1,200 witnesses should have been permitted to take the stand; but that the testimony of those who did testify as to such matters should have been accepted by the Board *as being material* to the issues and should have been fairly weighed and considered by the Board *as material*, in accordance with the previous opinion of the Court below, and that the offered testimony of the remaining 1,200 employees having been rejected as *cumulative*, should have been considered as though the "1,200 witnesses" had actually testified thereto (as Judge Riddick held XIII, 53). But the Trial Examiner and the Board *refused to regard this evidence as having any materiality whatsoever.* The Trial Examiner repeatedly said in the first trial that it was wholly worthless and he would not consider it (A, 484-5-6-7, 492-3).

In the second hearing, although he permitted eleven employee witnesses to testify and it was conceded that the remaining 1,200 employees would testify substantially the same way, this overwhelming proof did not move him one jot or tittle and he blandly finds in his second Intermediate Report, as in his first, that the employees were "coerced" by the employer into forming the Donnelly Garment Workers' Union, thereby necessarily holding that each and all of these 1,200 witnesses either committed perjury or that they were practically morons, who did not know when duress was being applied to them.

That the Trial Examiner completely disregarded and refused to consider the employees' testimony is conclusively shown by the fact that in his Intermediate Report the only mention made by him of this testimony—obviously the most important evidence in the case—is at X, 3848, where he says "the undersigned accorded the respondent and the Donnelly Garment Workers' Union an opportunity to introduce all of the competent and material evidence which was rejected at the prior hearing * * *," and then after devoting 40 printed pages to the recitation of other evidence, mostly circumstantial, and without once mentioning that the 1,200 employees testified to the contrary, the Trial Examiner at X, 3888, says: "*On all the evidence* the undersigned finds the respondent dominated and interfered with the formation and administration of the Donnelly Garment Workers' Union * * *"! A more flagrant disregard of important direct evidence and flaunting of the Court's ruling can hardly be conceived, unless it be that of the Board itself to which we now turn.

The Board was more blunt in stating its disregard for the evidence which the Court had ruled was material. The Board adopts the Trial Examiner's intermediate report word for word (A. 618) save for a minor correction

(A, 620) and bluntly says that it "adheres to its opinion," that the employees' testimony has no materiality upon the issue of domination—"* * * we are moreover impelled to adhere to the opinion, derived from our experience in administration of the Act, that *conclusionary* evidence of this nature is *immaterial* to issues such as those presented in this case". (A, 619).

The Board lamely attempts to side step its open avowal that it deems said evidence immaterial by saying that it "carefully considered all such evidence" (A, 619). It seems, obvious, however, that no *bona fide* consideration was given by the Board to evidence which it avowedly treated as immaterial. The respondent gained nothing by the Court's remand of the case to the Board to "receive *and consider*" (XIII, 5) the excluded evidence. It was the same as though the Board had again refused to receive it at all. The Board's refusal to accept the spirit of the Court's decision made the remand a mere farce. As said in *De Bardeleben* v. *National Labor Relations Board*, (C. C. A. 5) 135 F. 2d 13, l. c. 14-15:

> "The finding of the board that the acts of the employees in forming their own association were not their voluntary acts but were the results of domination, interference and support by the company, *in the face of the positive evidence of those who formed the organization* that this was not so, and with no evidence to the contrary, *is a mere fiat.*"

And in *Humble Oil & Refining Co.* v. *National Labor Relations Board*, (C. C. A. 5) 113 F. 2d 85, l. c. 91:

> "*If human testimony can establish anything*, it establishes that Humble did not dominate or interfere with the organization of either Federation."

Nor was this "conclusionary" evidence, as it is referred to by the Board. It is testimony as to *facts*. The

witnesses were asked, not only, "did you join the DGWU of your own free will," but were asked questions such as these: "Did any officer, executive or anyone that you thought was representing the management talk to you about the meeting?" (of April 27th) (VIII, 2565): "Now, prior to that meeting, had anyone, any officer, executive, or anyone representing the management, suggested to you or suggested to anybody else in your presence that the employees form a union?" (VIII, 2566); "Did any official, executive, or representative of the management request you to sign the petition?" (of March 2nd) (p. 2578); "Did you gain the impression from any source, or did you understand that the Loyalty League had anything to do with the formation of the Donnelly Garment Workers' Union?" (p. 2582); "Did you ever hear anybody in the factory say that Ross Todd represents the employers about labor matters?" (p. 2593) etc., etc. The *answers to all these questions were in the negative.* Those and many other similar answers constituted testimony as to *facts*, not conclusions.

But we also submit that the answers that the employees "joined the DGWU of their own free will and without coercion on the part of the petitioner" is testimony as to a *fact—i. e.* the state of mind of the witnesses—and as to the *fact* that such state of mind was not created by duress of petitioner. And who would know that fact better than the employees concerned?

The materiality and well-nigh conclusive character of this testimony seems obvious. This is not a case where a few or several employees testify to direct acts of coercion by officials or high supervisory employees, and several other employees and the officials deny such acts—here *there is not a single employee* (even including the hostile and adverse employees called by the Board) who testified to any direct act of coercion or interference on the part of

any official or supervisory employee of Respondent with respect to the employees joining or not joining the DGWU or any labor organization. On the contrary 100% of the employees concerned testified (or offered to testify) that there was no coercion.

At the first hearing the only witness who even came near to testifying to any coercion was the Board's supposedly "star witness," Elsa Graham Greenhaw (a hostile, former employee brought by the Board from Indiana, I, 353; II, 374-5, 378d), whose testimony was accepted by the Trial Examiner in his first intermediate report as overbalancing the testimony of all other employees and officials because she was "disinterested" and testified in a "straight-forward and unhesitating" manner (A, 519); but when the extremely *evasive* character of her testimony (I, 369-372; II, 373) was pointed out in Respondent's former briefs, and that the only coercion she was able to specify was alleged coercion in the 1936 *general election!* (II, 373), and a reprimand in 1936 by Mr. Keyes of some employees concerning their work! (II, 378g), the Board dropped Mrs. Greenhaw like a hot potato and she is not mentioned in the last 40-page decision except once (X, 3865), and that in a connection which shows no coercion. May Fike, the Board's other principal witness in the first hearing did not testify to any direct coercion as to labor affiliations.

In the second hearing, the Board put on six witnesses. Geneva Copenhaver admitted that there was no act or word of coercion by Respondent to cause her to join the DGWU ("* * * The company never intimidated me one way or the other, they never told me that if I didn't sign I would be fired; * * *"), (X, 3493, 3492), but she testified that she "felt" that if she did not join she might lose her job (X, 3498). Similarly, Mrs. Stevens, testified to no act or word of coercion (X, 3692). Both had previously signed

affidavits that they joined the DGWU freely and voluntarily (X, 3489, 3689-90). Mrs. Weilert testified that there was no coercion at the time of the formation of the DGWU (X, 3581) and for about two years thereafter (X, 3601) but later (when the DGWU did not do what she wanted done, (X, 3559, 3567) she thought something was wrong. She refused to do repair work and quit (X, 3578). Neither Mrs. Dorsey, Mrs. Skeen, nor Mrs. Keyes, testified to any direct coercion on the part of Respondent (See pp. 105-111, Part Two, *infra*, for further discussion of the Board's witnesses).

The foregoing situation differentiates the case at bar from *International Association of Machinists* v. *NLRB*, 311 U. S. 72, *NLRB* v. *Link-Belt Co.*, 311 U. S. 584, and *H. J. Heinz Co.* v. *NLRB*, 311 U. S. 514, and from practically every other Labor Board case in the books based on coercion or interference, where usually, as in *International Machinists* case, a number of employees testify to direct acts of coercion or interference by high supervisory officials.

Here the unanimous testimony of the employees that there was no coercion is corroborated by the testimony of Respondent's officials, Mrs. Reed, Mrs. Reeves, Mr. Baty, Mr. Keyes, that the Respondent and its management did not interfere in any way with the employees in their union activities. (II, 405-6-7, 430-1, 480-1-2, 539-540; VII, 2074, 2094, 2117, 2149, 2157, 2160). It is further corroborated by the fact that in the entire period of several years, covered by the testimony (1934-1942) the Board did not find a single instance of any employee (out of 1,200) being discharged for union affiliation. It is further corroborated by the fact that for a period of five years (now nine), in this era of "independence" of employees, there has been no change in the choice of the employees of the DGWU as their bargaining representatives (XIII, 55). And, lastly,

it is corroborated by the fact that none of the Board's witnesses testified to any direct acts of coercion by respondent.

Opposed to this direct, postive, 100% testimony of all persons concerned, is merely the conjecture, speculation, and inference of the Trial Examiner, based almost wholly on circumstantial evidence, most of which would possess little, if any, probative value, even if it were not opposed by such direct, positive, corroborated evidence.

In this situation we respectfully urge that the Trial Examiner and Board were not justified in disregarding the 100% testimony of the employees and "adhering to the opinion" that it was "immaterial," especially after the Circuit Court of Appeals had ruled that it *was* material and should be considered by the Board as *material*.

As said by the Court below in its prior opinion (123 F. 2d, l. c. 222):

> "The individuals who form an unincorporated association *certainly should know* what sort of an organization it is, *how it happened to be formed, who influenced its formation, and who controls it.*"

The refusal of the Board to put this evidence on the scales constituted a denial of due process to Respondent.

As was said by the Second Circuit in *NLRB* v. *A. Sartorius & Co.*, 140 F. 2d 203, l. c. 205:

> "* * * if an administrative agency ignores all the evidence given by one side in a controversy and *with studied design* gives credence to the testimony of the other side, the findings would be *arbitrary and not in accord with the legal requirement.*"

And by the Fifth Circuit in *NLRB* v. *Tex-O-Kan Flour Mills Co.*, 122 F. 2d 433, 438 (quoted by the 8th Circuit in *American Smelting & Refining Co.* v. *NLRB*, 126 F. 2d 680, 688):

"That the witness was or is *an employee of the party on whose behalf he testifies*, is not in itself a reason to discard his oath, appears from the cited case, and was extensively demonstrated in *Chesapeake & Ohio R. Co.* v. *Martin*, 283 U. S. 209."

In *NLRB* v. *McGough Bakeries Corp.*, (C. C. A. 5) 153 F. 2d 420, the court says (l. c. 425):

"The account given by Bunch, King and Martin, all sworn by the Board as witnesses, of the formation of the Independent and of the contract with it, is consistent and uncontradicted and shows no unlawful domination of, or assistance to, Independent. *This sworn testimony cannot be over-ridden by suspicion or by slight circumstances* that may be given another color. See *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 341, 53 S. Ct. 391, 77 L. Ed. 819; *Chesapeake and Ohio R. R. Co.* v. *Martin*, 283 U. S. 209, 51 S. Ct. 453, 75 L. Ed. 983."

In *NLRB* v. *Sheboygan Chair Co.*, (C. C. A. 7) 125 F. 2d 436, the court says (l. c. 439):

"The Board *should not discard the positive credible testimony of witnesses in favor of an inference drawn from tenuous circumstances* that at best could have supported only an *anemic suspicion*. Such an inference does not meet the test of substantial evidence" (Citing Consolidated Edison Co. case and other cases.)

In *A. E. Staley Mfg. Co.* v. *NLRB*, (C. C. A. 7) 117 F. 2d 868, the court says (l. c. 878):

"While we recognize that the Board is not bound by the findings or conclusions of its Examiner, as is a court by its master or referee, and that its findings are conclusive if substantially supported, yet we think that where its conclusion rests on inferences, such can not prevail *in face of direct evidence to the contrary*."

In *Keystone Steel & Wire Co.* v. *NLRB*, (C. C. A. 7) 155 F. 2d 553, the situation was similar to the case at bar in that a number of employees testified that there was no coercion and an offer was made that the 919 additional employees constituting the balance of the membership of the union would testify to the same effect. The Board refused to consider this testimony as having any probative value, as it refused to do in the case at bar. The court comments on this failure of the Board to accord any materiality to the employees' testimony saying (l. c. 560):

> "From this it seems clear to us that *the only manner in which the Board considered* the testimony of 1,137 witnesses out of the 1,371 employees was, as the Board said, as 'generally unreliable' testimony."

and the court refused to enforce the Board's order based on its finding that the employer dominated the employees.

In *Cupples Co. Manufacturers* v. *NLRB*, (C. C. A. 8) 106 F. 2d 100, the court says (l. c. 105):

> "the Board, like a jury, *may not disregard* the uncontradicted testimony of unimpeached and credible witnesses."

See, also, to the same effect *Chesapeake & Ohio R. Co.* v. *Martin*, 283 U. S. 209, l. c. 214-217; *NLRB* v. *Union Pacific Stages, Inc.*, (9 Cir.) 99 F. 2d 153, 177; *NLRB* v. *Greider Machine Tool & Die Co.*, (6 Cir.) 142 F. 2d 163, 165; *NLRB* v. *Thompson Products, Inc.*, (6 Cir.) 97 F. 2d 13, 15.

Respondent respectfully submits that the Board's refusal to treat as material the unanimous testimony of the employees concerned that they formed and joined the DGWU as their voluntary choice of a bargaining agency, was not only a flagrant abuse of its own power (*Consolidated Edison Co.* v. *National Labor Relations Board*,

305 U. S. 197, l. c. 226; *Indiana and Michigan case, supra,* l. c. 28; and other cases, *supra*), but was also a flagrant disregard of the Court's ruling, and that the Court below was amply justified in refusing to enforce the Board's Order so arrived at.

The Board's Argument.

The Board in its brief does not deny that it refused to accord any materiality or weight to this overwhelming direct testimony of 1,200 unimpeached witnesses, but openly admits that the Board refused to follow the court's mandate in this respect. At page 17 the brief says "the Board properly *refused* to give weight to this conclusionary testimony." It says (pp. 18 and 76) that the Board should not be required *even to receive* it; and at page 75 it says that "the Board's treatment of the testimony in question was *entirely proper* * * *."

In this respect counsel take the same position that the Board, itself, took in its order, "adhering to the opinion" that the testimony is "immaterial" to the issues (A. 619).

The Board thereby puts itself above and beyond the court and refuses to accord to the court the place which Congress provided the court should have in labor board cases and contrary to the ruling of this court in *Ford Motor Co.* v. *NLRB*, 305 U. S. 364 (l. c. 372-3-4-5) where it is said (p. 375) that the Board voluntarily did "what the court could have compelled."

The reasons given (pp. 75-82) for the Board's refusal to obey the letter and spirit of the court's remand are (1) that the organization, structure, and company support of the DGWU were such as to insure company domination; (2) that such testimony is "introspective"; (3) that it is "unreliable"; (4) that employees do not know whether

or not any coercion is being applied to them; (5) that employees may not feel free to testify to coercion; and (6) that it should be excluded in the interests of administrative efficiency (pp. 17-18).

None of these reasons is valid. (1) the structure, organization and alleged company support of the DGWU here is not such as to insure company domination. The court below in its previous opinion pointed this out (123 F. 2d l. c. 222):

> "*This was not a case* where domination and support by an employer of an independent union was conceded or where the independent union *was conclusively shown to be of a character* which could not, in any event, act as the bargaining representative of its members."

Here there was no "prior" union or employer-employee plan in which the employer had participated, as existed in *NLRB* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, and similar cases. Here the nature of the structure, organization and alleged company support of the DGWU *depends on employee testimony.* The Board by its argument attempts to lift itself by its own boot straps—it first finds from the testimony of its own few employee witnesses that the structure, organization and support of the DGWU was such as to insure company domination, and then, having so found, it says that the testimony of the Respondent's 1,200 employee witnesses is rendered "immaterial" because of such finding. Obviously the testimony of the Respondent's 1,200 witnesses should have been received and considered prior to determining the nature of the structure, organization and alleged company support of the DGWU and, if it had been in good faith received and considered, it would have pre-

cluded any finding that the structure, organization or support of the DGWU was such as to insure company domination.

The Board, in ascertaining the nature of the structure, organization, etc., of the DGWU received and considered employee testimony just as introspective and conclusionary as the excluded testimony of the 1,200 witnesses offered by Respondent. The Board asked Mrs. Dorsey and Mrs. Skeens whether they regarded themselves as supervisory employees (IX, 3324, 3434) and asked whether the employees considered the instructors as supervisors (IX, 3325, 3434; X, 3481, 3673); and whether the members of the DGWU felt free to express themselves with instructors present (IX, 3318; X, 3878); and accepted Rose Todd's statement that she was "distressed" at having to use the word "union" (X, 3873). Surely the testimony of the 1,200 witnesses is just as much entitled to consideration as such testimony from the Board's witnesses, yet the Board upon the testimony of its witnesses found that the instructors "regarded themselves as supervisory and are so regarded by the operators" (X, 3852), and now makes no complaint of the reception or conclusionary character of such testimony.

(2) The testimony and offered testimony of the 1,200 witnesses was not wholly introspective but largely consisted of statements of fact as to how and why they formed the DGWU and as to statements of fact showing there was no coercion by Respondent. An employee knows whether an employer has told him that if he joins a union he will be "fired" and likewise he knows whether the employer has not so told him. If no such pressure has been applied, he can say as a fact that no such coercion occurred. (Note the type of questions asked p. 48, *supra*.)

When such testimony is multiplied by 1,200 it removes much if not all of the introspection or unreliability which might inhere in such testimony if given by only one or a few witnesses. The vote of an employee at a labor board election involves just as much introspection yet the Board accepts such vote as representing the free and voluntary choice of the employee. Should employee testimony *under oath* be accorded any less materiality or credence? What could be more introspective than the testimony of the Board's witness, Geneva Copenhaver, who testified (X, 3498) that "it was clear in my own mind that if I did not belong to the union, I wouldn't have a job there very long," or that of the Board's witness, May Stevens, who, when asked if the employes at the DGWU organizational meeting were not told that they "were to do as you pleased," answered: "Perhaps so, but we knew differently" (X, 3692).

The Board received and accepted *and acted on* that testimony notwithstanding its introspective nature. Apparently the Board is willing to receive and accept introspective, conclusionary testimony if it is favorable to the Board but deems that it should not be considered or even received if favorable to the employer.

Concerning the comments of this court in *NLRB* v. *Link Belt Co.*, 311 U. S. 584, that it would be a rare case where the finders of fact "could probe the precise factors of motivation which underlay each employee's choice," we believe the case at bar may fairly constitute the exception that proves the rule, for here there was substantial opportunity to probe those factors, as the testimony of *all* the employees was offered on the question and furthermore the *net result* of their reasons was *physically* presented in the form of affidavits, an acceptable form of evidence in Labor Board hearings.

(3) As to "unreliability," we need say little. If only one or a few employees testified to no coercion there might be just ground to believe that the few might be mistaken or not know of coercion applied to the many other employees not testifying; but where the entire 1,200 testify to the same thing, the likelihood of mistake fades entirely away, considered from any reasonable juridical standpoint. Such evidence then not only becomes reliable but well-nigh conclusive; certainly not to be ignored, as was done here.

(4) It seems ridiculous to say that intelligent employees do not know when pressure is being applied to them to join or not to join a union. As the cour below said (123 F. 2d l. c. 222):

> "The individuals who form an unincorporated association, *certainly should know* what sort of an organization it is, how it happened to be formed, *who influenced its formation, and who controls it.*"

(5) The contention that employees are not free to testify truthfully is likewise fallacious. If the employees had been coerced by Respondent to join the DGWU in 1937 against their will, they would have welcomed the opportunity given by the Labor Board hearings in 1939 and again in 1942, to say so. And certainly this reason even if it would be valid in a small organization of 6 or 8 employees would not apply to 1,200 employees. The cases cited by the Board in footnote 18, page 77, are not applicable—the employer here was not conducting a "pool" or "poll" of its employees—it was presenting testimony in a proceeding conducted by the Labor Board itself, under all the sanctions of oath and conditions designed to insure free testimony by employees.

Nor are the cases cited by the Board (footnote 19, p. 78) applicable here as those cases involve "prior" labor

unions or plans in which the employer had such an integral part that it was deemed to carry over into the successor union. Here there was no prior union.

Nor is *Western Cartridge Co.* v. *NLRB*, 134 F. 2d 240, applicable to the case here for at least three reasons: In that case the board received the testimony of the witnesses "who participated in the organization of the Independent" as to their reasons for joining but refused to receive the testimony of several thousand employees as to their reasons for joining *after* its formation (l. c. 245). Here, on the contrary, the Trial Examiner refused to receive the testimony offered of the employees *who participated in* the formation of the DGWU. Secondly, there is nothing in the *Western Cartridge* case to indicate a pre-judgment on the part of the Trial Examiner or Board against the employee testimony, as here; and thirdly, the factual situation in the Western Cartridge case was wholly different. There the court found that the company "engaged in varied coercive measures to keep the employees from joining the A. F. of L." (l. c. 243), and recites a number of such instances. Here the Respondent engaged in no coercive measures to make the employees join or not join any union, but the employees freely met and formed their own union in such spontaneous unanimity as to leave no doubt that their action was voluntary and not coerced. The cases cited by the Board in footnote 20, page 80, are distinguishable because they involve prior company-dominated unions or because they disclosed coercive activities by the employer, or both (See also discussion in Part Two, *infra*, of "prior union" under B-3, 1.

At page 81, the Board says that it called several of the employees listed in Respondent's offer of proof "who testified that employees were coerced." None of such witnesses testified to any direct acts of coercion by Respondent (See discussion of the testimony of the Board's wit-

nesses, pp. 105-111, *infra*; surely that testimony falls far short of any direct coercion). Nowhere in the record is there any testimony of any economic pressure whatever by the management against any employee to form or join the DGWU. This distinguishes the case at bar from practically all cases where the Board's orders based on "domination" have been upheld.

The Board's argument (p. 81) that if any employee testimony is to be received, the "total number" of employees would be required, is answered by the fact, first, that the testimony of the total number *was* offered and also their affidavits were introduced (VI, 1677-1749), and, secondly, it was conceded by counsel for the Board and ILGWU that the testimony given by Respondent's employee witnesses was a fair sample of what all the rest would say (IX, 3252-3). That the total number of employees were not called here was due to the Trial Examiner's ruling that further testimony would be cumulative. While that is a proper method of controlling the extent of testimony, it is not a proper method if the tribunal may then say that the proof has failed because further such testimony was not given!

The Board's argument (p. 82) that the evidence if admitted would not change the result is not valid. The excluded testimony, instead of being "of the slightest" probative value, was well-nigh conclusive, when considered by a "reasonable," unbiased mind.

(6) Lastly, the Board, "in the interest of administrative efficiency," has no right to exclude evidence of employees as to whether the union they have selected was freely selected. The very purpose of holding a Labor Board hearing is to establish that fact. Of course, it is not necessary to hear the entire 1,200 from the stand if the Board does not wish to do so. It may hear sufficient

to obtain a fair picture and consider that the others would testify to the same effect, as was conceded at the second hearing here (X, 3252-3).

We respectfully submit that the Board has not advanced any valid justification for the Board's repeated refusal to follow the court's mandate, to consider, in good faith, the testimony of Respondent's 1,200 employee witnesses.

(2) Evidence of conspiracy and violence by ILGWU.

In *NLRB* v. *Indiana and Michigan Electric Co., Supra*, this Court in passing upon the materiality of evidence of violence and lawlessness engaged in by the petitioning union held (headnote 1) that—

> "the dynamiting and other acts of violence might have explained the preference expressed by some employees for the latter union, which preference had been wholly disbelieved by the Board, and, on the whole case, it would seem that the Board ought to have considered the dynamiting, along with the other evidence, before reaching any final conclusion in the case."

And the Court also held (l. c. 20) that such evidence would go to the

> "fairness of giving absolute finality to the Board's findings of fact" and also (l. c. 24) would bear on the employees' "good faith in testifying to the reasons for preferring an association of their own to Local B-9."

The excluded evidence here, with reference to the conspiracy, unlawful activities, and threats of the complaining union, ILGWU, against the Donnelly company and its employees, comes within the same general category as that ruled upon by this Court in the *Indiana and Michigan case, supra.*

The trial examiner and the Board refused to receive evidence and rejected offers of proof to show that at all of the times mentioned in the complaint the ILGWU was engaging in unlawful acts and threats of violence and fraud, and to show the illegal methods practiced by the ILGWU in its activities to force petitioner to compel its employees to join the ILGWU against their will. Said acts which petitioner desired to prove are briefly described in Assignment of Error No. 30 (A, 64, 67), which we respectfully ask the court to read.

The excluded evidence would have shown that the ILGWU was threatening to subject the Donnelly employees to physical violence and to the humiliation of having their clothing stripped from them in the public streets, as the ILGWU had been doing in its other strikes (A. 488-491; IV, 1216, 1228, 1273, 1275, 1302, 1305; V, 1412, *et seq.*, 1477, 1483, 1511, 1527, 1546; XII, 4195) as well as endangering their jobs and right to go to and from their work in peace and security. These were vital rights—rights which respondent's employees might be expected to protect and preserve to themselves by every lawful means, without any pushing or "coercion" by respondent. This evidence, therefore, had a direct bearing on the principal issue here of whether there was "domination" by respondent or whether the employes acted of their own volition (*Indiana and Michigan case, supra*).

The Board refused to receive such testimony or to let respondent go into any of the matters relating to such conspiracy (A. 509) which were pleaded as a defense in Part B of respondent's answer (A. 387-394), but struck that part of respondent's answer (A. 508) and rejected respondent's offer of proof (III, 742d; VIII, 2562) on Part B of its answer (See Assignment of Error No. 30, A. 64-67).

The respondent and intervener DGWU also repeatedly offered to prove by witnesses on the stand that the ILGWU and its strikers at nearby garment plants had, *immediately preceding* the formation of the DGWU, committed many acts of violence against the employees of those garment factories and had threatened that the Donnelly employees "would be next" and would be subjected to the same or worse violence (I, 144; IV, 1221, 1225, 1228), and that these threats and activities of the ILGWU were communicated to the Donnelly employees and created great unrest among them and motivated and caused them to take steps for their own protection (A, 488-9), one of which was the formation of the DGWU.

> "Q. Tell me what they said, and who it was?
> A. As this old lady got up and started in the building somebody said, 'Isn't that awful, the way they are treating her?' And Miss Tobin said, 'That's just a sample of what we are going to do down at Donnelly's.'
> Q. (By Mr. Patten) Did you report that at the plant?
> A. I talked it over with the employees.
> * * * * * * *
> Trial Examiner Batten: * * * I am not going to receive that type of testimony on that question" (II. 718z, 718bb).

The main issue in this case is whether the respondent coerced its employees into forming the DGWU or whether the employees formed and joined it voluntarily because of some other reason. The materiality of this and other similar testimony and offered testimony is, therefore, apparent—if they formed and joined the DGWU voluntarily by reason of a desire to protect themselves against the threatened violence and other activities of the ILGWU,

then obviously they did not form and join it because of respondent's coercion.

This evidence, therefore, tended to disprove the principal charge in the complaint. It also tended to corroborate the offered testimony of the employees that the respondent did not dominate or coerce them into forming or joining the DGWU but that they formed and joined the DGWU of their own free will and accord, as it shows a logical reason for such action.

The refusal to receive and consider this evidence was therefore highly prejudicial to respondent.

In *NLRB* v. *Asheville Hosiery Co.*, (C. C. A. 4) 103 F. 2d 288, the Court said (l. c. 291-292):

> "Evidence of the most convincing kind shows that the misrepresentations and threats above referred to had stirred up violent resentment on the part of a majority of the workers against those who favored the Union. * * *
>
> "There is no substantial ground for the rejection of the overwhelming evidence that the hostile attitude of the great majority of the workers toward the Union proceeded from their sincere and spontaneous dislike of outside interference; and *it is not enough to say that the management shared this feeling* and manifested it in the statements of its supervisory officials."

This evidence was not excluded by the Trial Examiner merely on the ground that it was cumulative—the Trial Examiner repeatedly refused to *consider* at all that *type* of evidence. The fact that in isolated instances an occasional answer or statement of a witness to this effect was made and appears in the record, does not cure the error. The Trial Examiner refused to consider this evidence *at all*, and it was not considered either by the Trial Examiner or the Board.

The attitude of the Trial Examiner in refusing to consider this evidence is shown in Respondent's exceptions before the National Labor Relations Board Nos. 52, 58, 59, 87, 154, 155, 156, 161, 165, 166, 167, 178, 179, 184, 219, 220, 241, 259, 266, 300, 301 (A, 86, 93, 94-5, 116-7, 185-6-7-8, 189, 193-4, 196-7-8-9-200, 207-8-9, 215-16-17, 249, 251-2, 255, 257, 276-7, 295-6, 308, 336, 301; X, 3787-3791).

This evidence, had it been admitted and considered, would have been conclusive (to an unbiased mind) that Respondent did not coerce or interfere with its employes in their free choice of a union, but that their choice of the DGWU was motivated and impelled by reason of the unlawful activities and threats of the ILGWU, and their desire not to be represented by such a union.

The court below was "not in error" in ruling that this evidence should have been received by the Board, and that Respondent was denied a fair trial by reason of the Board's refusal to receive and consider it.

The Board's Argument.

The Board argues (pp. 96-104) that the Board was justified in refusing to receive or consider the foregoing offered testimony as to the violence perpetrated by the ILGWU against employees of other garment plants and threats to inflict the same or worse upon Donnelly employees and other unlawful acts of the ILGWU because, it claims, the court below in its first decision ruled that the Board need not receive such testimony. We do not believe the court's opinion is susceptible of that construction. The court did not really discuss or specify what evidence was or was not admissible except the "employee testimony." As to the alleged conspiracy, it merely said 123 F. 2d l. c. 225:

> "We are of the opinion that the Trial Examiner did not err in confining the issues to those which were tendered by the complaint filed by the Board. We are satisfied that the Board was not required to try the International for alleged conspiracy nor to try the charge that the Board had conspired or colluded with the International."

It did not say that acts of violence by the ILGWU against other garment workers or threats to use similar violence against the Donnelly employees was not to be received. It is reasonable to believe that the most the court meant was that the Board did not have to dismiss the complaint, by reason of the International's bad motives in filing the charge, and that it did not intend to rule that evidence bearing on the question of the "free action" of the Donnelly employees in forming a union should be excluded even though it might relate to the ILGWU or its activities.

That the court contemplated that the Board should receive *other* rejected evidence besides the so-called "employee evidence," is shown by the court's comments (p. 224) that a "Trial Examiner should receive all evidence offered by any party in interest except such as is palpably incompetent * * *" and that "we say this in the hope of preventing a repetition of what occurred in the case now before us," and by the court's final language (p. 225) that the Board should "accord to the petitioners (Respondents here) an opportunity to introduce all of the competent and material evidence which was rejected by the Trial Examiner." Had the court been referring only to the rejected "employee testimony" it would undoubtedly have specified "the rejected employee testimony" instead of saying generally "all competent and material evidence." The court did not specifically rule one way or the other upon several

items of evidence which Respondent claimed should have been received. The Board says (p. 94): "there still remain numerous rulings of the examiner on the admissibility of evidence urged by the company as prejudicial error in the court below which have not been expressly passed upon by the court below in either its first or second opinion." We think that the rejected evidence as to violence, threats, etc., comes within this category and that the court in its first opinion did not attempt to limit or delimit with nicety the range of evidence to be received at the second hearing, but intended that the Board should receive all competent and material evidence offered.

This view is substantiated by the language of the court itself in its last opinion in which it indicates that it did not regard its first opinion as ruling that testimony as to the ILGWU conspiracy, violence, threats, etc., was not to be received but merely that the Board could, but was not compelled, to inquire into whether it should drop the complaint because "it was being taken advantage of to further unlawful or unworthy activities of the complaining union" (XIII, 45). But, if it should go ahead with the hearing, there was no intimation by the court that it should not receive all competent and material evidence. Thus there is "no change of position" by the court as the Board assumes (p. 99) and the proffered evidence is well within the terms of the remand. Its relevancy is patent as it bears directly on the most important issue in the case—whether the employees formed the DGWU of their own volition, motivated by the acts and threats of the ILGWU against them, or whether it was because of coercion by Respondent.

As the court says (XIII, 46), "the charges of misconduct made by the company and the plant union against the International *are not without substance* is shown by

the record." (See holdings of federal courts in *Donnelly Garment Co. v. ILGWU et al.*, referred to in the Statement of Facts, *supra.*)

As shown above, the Trial Examiner refused to accept testimony as to threats of dire consequences to be visited by the ILGWU upon the Donnelly employees. Such evidence was, therefore, not before the Board and not considered by the Board or Trial Examiner. The same is virtually true as to the whole ILGWU conspiracy and misconduct. Had this evidence been received and fairly considered, in good faith, it might well have changed the Board's decision, as it would have thrown light on the good faith of the employees' testimony that they were not coerced but formed the DGWU of their own volition for the reasons stated (*Indiana and Michigan case, supra*). It might also have eliminated the Board's conclusion that their testimony was "unreliable."

This evidence was far from being a "collateral" matter as the Board argues (pp. 103-4). It was the very foundation of the employees' action, according to their unanimous testimony.

We respectfully submit that the Board has presented no adequate reason for the rejection of this important and material testimony or for upsetting the decision of the court below.

(3) Failure to receive evidence as to events in 1934-35.

The Board over respondent's objections (III, 1110 a, b, c), received in evidence at the first hearing, hundreds of pages of testimony given in an invalid NRA proceeding back in 1934-35 (prior to the enactment of the National Labor Relations Act). Respondent contends, and the Court below ruled (XIII, 48), that having admitted the Board's and ILGWU's evidence as to the 1934-35 activities, the

Board should not have excluded respondent's countervailing evidence and cross examination relating to the same period and events (VIII, 2784-2808 inclusive, 2823-25, 2887-8, 2896; X, 3757; A, 278-281, 285-286). The Board based its finding (erroneous, we claim) of respondent's "hostility to unions" on such evidence (X, 3859-63, 3885-6). If the so-called "background" was material, certainly respondent was entitled to show all the surrounding circumstances. At the last hearing, counsel for the Board interrogated respondent's employee witnesses concerning said so-called background and particularly with reference to the Loyalty League. Respondent then sought to inquire into the activities of the ILGWU at said times (VIII, 2784). Counsel for the Board and the ILGWU objected and the Trial Examiner ruled that respondent would not be permitted to go back of November, 1936, with regard to such evidence. After extended argument (VIII, 2784-2808) Trial Examiner Batten stated (III, 2808):

> "I think we are ready to proceed and I think the offers of proof contemplate the period in or about March 18, 1937, and as to any strike or matters of that kind which occurred during that period, and I think it is reasonable to go back to—I think the offers contemplated at least a period, I would say, from November on, *and anything prior to that I will now rule are not covered by the offers of proof* and, therefore, should not be presented at this time in line with my ruling directing the order of proof."

In other words, the Board was given the right to go back to 1934 and 1935 but respondent was denied that right.

Nor was this a mere ruling on "order of proof," as the trial examiner *never* permitted respondent to present such evidence (VIII, 2562; IX, 3257, 3265; X, 3783; III, 742b; A, 64-67; 508-509).

Besides, the offers of proof *did* cover the offered testimony as there was no time limitation in them.

A few minutes after the ruling at VIII, 2808, towit at pages 2823-25 (Assignment of Error No. 244, A, 279-281), the trial examiner permitted the Board to examine the witness about incidents that occurred in 1935. Even counsel for the Board evidently felt the trial examiner's failure to sustain respondent's and interveners' objections was contrary to his ruling limiting the evidence to November, 1936 (Miss Weyand's statement, VIII, 2825). But the trial examiner persisted in letting the Board go into these matters prior to November, 1936, and the Board did continue through pages 2825-2831. At VIII, 2887-89, similar testimony by the Board was permitted over objection that it went back prior to November, 1936 (Assignment of Error No. 248, A, 285). Similar ruling was made at page VIII, 2896, again at IX, 3336-7, and again at X, 3757.

Counsel for the Board in their brief (p. 98) say that the six months' period (*i. e.* to November, 1936) back of which no testimony should be received, was fixed "at the suggestion of counsel for the Company (VIII, 2788, 2805-2809)." However, the Court will observe from those references that the suggestion was made only in the event it was observed on *both* sides, *not* that respondent should be so limited and the Board be permitted to go farther back (as the Board permitted the Board to do, while restricting respondent to the six months' period). After much argument, the Trial Examiner conceded that this was the extent of Mr. Ingraham's suggestion, saying (VIII, 2808):

> "Trial Examiner Batten: Well, it is very obvious *I was mistaken*, in your remarks, Mr. Ingraham."

(But the Trial Examiner still continued to permit the Board to go back of six months and continued to refuse to permit respondent to do so.)

The relevance and materiality of respondent's countervailing evidence and cross examination as to these matters, and the unfairness of excluding it, seem too obvious to require further discussion, especially in view of the fact that the Trial Examiner and Board attached great importance to the Board's 1934-1935 testimony and used such testimony as a basis for many adverse findings against Respondent.

Respondent made an additional offer of proof (Board's Ex. I-VVVVV, X, 3792) at the second hearing, which the Trial Examiner also rejected (X, 3783).

The Court below was "not in error" in ruling that this offered evidence should have been received and considered.

The Board's Argument.

At pages 90-91 the Board argues or rather assumes that this evidence was properly excluded because not within the terms of the remand. Such position is wholly fallacious. The court did not in its remand limit the testimony to be taken strictly to the offers of proof. It said (123 F. 2d l. c. 225) that the Board should "accord to the petitioners (respondents) an opportunity to introduce all of the competent, and material evidence *which was rejected* by the Trial Examiner." If this testimony was rejected at the first hearing, it was certainly within the letter of the remand. It was so rejected.

The Trial Examiner at the first hearing overruled Respondent's objections to the introduction of the old NRA record (III, 1110a-1110c), thereby forcing Respondent to introduce portions of the testimony from that record; but instead of receiving such testimony *outright*, the Trial Examiner qualified his ruling so as to deprive Respondent of any beneft from the evidence. In admitting such evidence, the Trial Examiner ruled (A, 509):

"Acceptance of the testimony is not intended to enlarge the issues as defined by the pleadings *or to reverse rulings heretofore made* with respect to the introduction of evidence upon certain subjects."

The Board in its first decision states (A, 560):

"On Part B of the answer the respondent submitted certain parts of the transcripts of testimony taken in an NRA hearing, in which it was also the respondent and the ILGWU the charging union, and in the United States District Court injunction suit between the respondent and the ILGWU. The Trial Examiner *refused the proffered evidence*, granted the motion of the ILGWU to strike, * * * The Board has reviewed these rulings of the Trial Examiner and they are hereby affirmed."

Clearly, therefore, under the foregoing and the "qualified acceptance" of the NRA testimony offered by Respondent, it was rejected at the first hearing and comes strictly within the language of the court's remand quoted above.

The Respondent and intervener sought to have the Trial Examiner clarify his ruling qualifying the reception of said NRA evidence (A, 463-4) which he refused to do (A, 467). That this evidence was clearly excluded and not considered is indubitably shown by the Board's further statement in the first decision (A, 561 and footnote 12) with reference to such ruling:

"After the close of the hearing the respondent and the DGWU filed motions requesting the Trial Examiner to clarify his ruling, alleging that it was unfair, prejudicial, and denied them due process of law. The Trial Examiner denied these motions. We have examined the evidence contained in these partial transcripts in the light of the Trial Examiner's other rulings on the admission and exclusion of evidence and find no prejudicial error in his denial of these

motions. His denial of said motions is hereby affirmed."

"12. It is manifest that the Trial Examiner's ruling *excludes* any evidence in these partial transcripts relating, *inter alia*, (1) to contracts between the ILGWU and other garment manufacturers, (2) to the claim of the respondent that it pays higher wages and maintains better working conditions than do other garment manufacturers, (3) to strikes and violence allegedly fomented by the ILGWU at other garment factories, (4) to the alleged conspiracy of the ILGWU against the respondent, (5) to testimony of the respondent's employees that they were not interfered with, restrained, or coerced by the respondent in their choice of the DGWU or their rejection of the ILGWU, and that the DGWU was formed by the employees because of the strikes and violence occurring at other garment factories which the ILGWU was attempting to organize."

From the above enumeration of the 5 classifications of evidence excluded from consideration in the NRA testimony, it will clearly be seen that the Trial Examiner and Board rejected and refused to consider virtually all of the offered testimony beneficial to respondent. The Board can with little grace now argue that such evidence was not rejected and hence not within the terms of the court's remand. The net result was that the Trial Examiner and Board considered and *accepted as true* all the old NRA evidence deemed favorable to the Board and at the same time ignored all the countervailing evidence therein favorable to respondent. That is lack of due process to the Nth degree and is characteristic of the Trial Examiner's attitude throughout the entire case.

We respectfully submit that the Board has totally failed to show that this offered evidence was outside the

remand, or to give any valid reason for refusing to receive this evidence or why the decision of the court below with reference thereto was not correct.

Board's "Misuse" of 1934-1935 Evidence.

Not only was respondent denied a fair trial by the Board's rejection (by its "qualified" reception) of respondent's testimony from the old NRA hearing, as pointed out above, but the Board also denied respondent a fair trial by its *misuse* of the old NRA testimony, by *basing findings* thereon, although the alleged acts, if they occurred, occurred prior to the passage of the act.

The trial examiner in the first hearing announced that he would permit one witness for a half hour of "background" testimony (I, 7). He ended up with admitting (over respondent's objection, III, 1110a-1110c) whole reams of testimony from the old NRA hearing. The following references, given in the Board's brief, *in support of* the Board's *findings*, are all either references to the old NRA testimony, or to testimony concerning matters prior to the passage of the National Labor Relations Act:

p. 25—III, 1058; IV, 1120i, 1120u, 1120v, 1120z-1120bb, 1120dd-1120ee, 1120jj-1120mm; III, 1059-1061, 1092-1093, 1109.

p. 26—III, 1059; IV, 1120x-1120y.

p. 27—III, 1059, 1092-1094; IV, 1120x-1120y, 1120mm; III, 1092-1093.

p. 34—III, 1033-1034, 1102, 1104, 1058, 1105-1106, 1113, 1120g-1120h, 1107-1108, 1034, 1103-1104, 1106-1107, 1091, 1096-1097, 1033, 1036-1037, 1043, 1047, 1052, 1098; IV, 1120-1120b, 1120mm-1120rr, 1120vv, 1140-1141, 1153, 1156-1157; III, 1099; IV, 1120oo-1120rr, 1152-1156b.

p. 35—III, 1035-1036, 1044-1046, 1052-1055, 1067-1068, 1073-1074, 1076, 1079-1087, 1141, 1153-1154; IV, 1329; III, 1088-1089, 1068; IV, 1331; III, 1100-1101, 1101-1102, 1047-1048, 1063, 1069, 1090; IV, 1150-1151, 1323, 1325-1326, 1331; III, 1070; IV, 1331.

p. 36—III, 1036-1037, 1046-1051, 1098; IV, 1153; III, 1046-1049, 1037-1040, 1042-1044, 1051; IV, 1316-1317; III, 1032-1110a; IV, 1318; III, 1062-1066, 1073-1077; IV, 1120uu-1120vv.

p. 37—IV, 1126v-1129, 1130d-1130e, 1132-1136; 1156b-1157; 1323-1327; 1332-1334; III, 1044-1046, 1047-1048, 1080-1081, 1141-1142, 1078; IV, 1125.

p. 38—III, 1078, 1078-1079, 1071.

p. 39—III, 1091, 1097, 1108, 1113, 1117, 1011.

From that evidence the Board finds, among other things, that respondent had discriminated against certain employees because of their alleged affiliations with the ILGWU (Board's brief, pp. 9-10), and thereon bases its finding of respondent's "hostility" to unions and on that inference bases many other findings.

From such testimony it also makes findings that instructors and other employes were (in 1937) supervisory employes (X, 3854), and other adverse findings.

The board thus goes far beyond the legitimate use of "background" testimony (admissible for the *light* which it may throw on *subsequent* acts, not as substantive evidence of guilt). *First;* it amounts to conviction of respondent for alleged acts which, if true (which we deny), were not unlawful at the time, and takes away from respondent the presumption that, after acts are declared unlawful, the respondent would obey the law.

The *second unfairness* consists in the way the Board admitted this evidence. The Amended Complaint herein contained charges (A, 423) that respondent had discharged

some 18 employees (later reduced to 15) involved in the old NRA charges (IV, 1319). The Board *dismissed* the charges herein as to those 18 employees (II, 388; A, 506, 512), presumably because not deemed relevant or material to the issues here. But after so dismissing and striking out these allegations in the complaint the trial examiner proceeds to determine the issue of union discrimination under the old NRA testimony adversely to respondent, even though the trial examiner, had also *struck the testimony* concerning the discharge of all those employees except three (II, 397), and later dismissed the charge as to those three (A, 512).

The *third unfairness* consists in the fact that the trial examiner here, as on all other matters, *assumes as true* every statement *adverse* to respondent in the old NRA testimony, and completely *ignores* the testimony *favorable* to respondent. A brief review of the circumstances surrounding the layoff of said 15 employees will demonstrate that the Board has ignored respondent's evidence. The NRA testimony clearly shows:

(1) That the 15 employees were laid off along with some 300 other employees, due to business depression (IV, 1158).

(2) That at the time of such layoff of the 15 girls respondent did not know that any of them belonged to the union (IV, 1159) and all except one of them did not then belong.

(3) That before any complaint was made to respondent by the union or by the N. R. A. Labor Board concerning the layoff of those girls, respondent had already reemployed eight of such "union" girls along with the reemployment of approximately 150 of the 300 girls laid off (IV, 1159).

(4) The employees transferred to the branch plant were not known to be union girls and were only a small part of the total employees at the branch factory (IV, 1120vv). The branch plant was a desirable place to work (IV, 1121).

A fair consideration of this evidence compels the conclusion that there was no discrimination against these employees.

Lastly, and highly significant in this connection, is the fact that although petitioner has been in business for 25 years, employing from 1,200 to 1,300 employees during the last several years, with the large turnover incident thereto, *the Board was not able in this trial to establish a single instance during all those years* of the discharge of an employee because of union affiliations. That fact speaks volumes. It renders baseless the findings of petitioner's "hostility" to unions (made by the Board on the old NRA testimony), and renders baseless the many other findings based on the finding of "hostility."

(4) Failure to receive evidence of provisions of ILGWU contracts.

The issue here is not merely the general, abstract question of whether in an unfair labor practice proceeding the contracts of the complaining union with other employers are admissible, as petitioner seems to present it. The relevance of the evidence is based, first, upon the fact that the Board and ILGWU devoted much time and evidence in an effort to show that the contracts between respondent and the DGWU were "sham" contracts (I, 160d, 160g, 161-2, 205-6), in support of their contention that the DGWU was dominated by respondent. They pointed to the provision in the DGWU contract that members of the bargaining committee must have been employed for a year by the respondent (I, 160d, 160g), as

showing company domination. To rebut this and show that the provision was a proper and usual one in union contracts and hence no proof of domination, respondent offered to prove that the ILGWU contracts contained similar provisions (VI, 1656, 1661-2, 1669). Such evidence was clearly competent for that purpose and its materiality is shown by the Board's adverse comment based on the very contention which this rejected testimony would have refuted (X, 3879; Board's brief, p. 60).

In its prior decision the Board held that the insertion of that clause in the contract was "indicative of the Respondent's domination" (A, 603).

The contracts were also offered and were admissible for the purpose of showing that the wages and working conditions which the ILGWU was obtaining for its union members were not so favorable as those existing at the Donnelly plant, to refute the Board's and ILGWU's contention that the DGWU contract was not a good contract for the employes.

The Court was "not in error" in ruling such contracts admissible for the purposes offered.

The Board's Argument.

The Board's arguments (pp. 92-96) with reference to the Trial Examiner's refusal to receive in evidence the ILGWU contracts, are without merit. Counsel say, first, that they were not within the terms of the remand—but the only ground advanced in support thereof is that the Circuit Court of Appeals did not expressly mention them. We think a fair construction of the opinion, therefore, is that they were within the terms of the remand particularly as the case was remanded to receive "*all* competent and material" evidence which had been refused by the Trial Examiner, accompanied by an admonition that ordinarily

a Trial Examiner should receive all evidence offered unless palpably incompetent." The contracts were clearly relevant and admissible to off-set the Board's and ILGWU's contentions as pointed out above.

The Board's argument (p. 95) that the contracts are not admissible because the Board made no *finding* that the DGWU contract was a "sham" contract, is no answer. The Board and the ILGWU were *so contending* at the trial. A defendant litigant is not precluded from introducing competent evidence to rebut the opposition's evidence merely because the tribunal may not make a finding on the other side's testimony; if so no defense evidence would ever be admissible. Besides, as stated above, the Board in its first decision had found that a certain clause in the DGWU contract was "indicative of Respondent's domination" (A, 603). At the second hearing, Respondent was therefore entitled to rebut the evidence on which that finding had been based, the Board having refused to let Respondent rebut it at the first hearing.

The case of the *Bethlehem Steel Co.* v. *NLRB*, (120 F. 2d 641, 651) is not to the contrary. In that case the purpose in introducing the contracts was to make a *general* showing "regarding the dates, scope, duration and terms of the agreements * * *" (l. c. 651). The court held the contracts irrelevant for *such* purpose. The purpose here was not general but to rebut specific contentions made by the Board and ILGWU in the trial.

The Board has presented no logical reason militating against the relevance of these contracts for the purpose for which they were offered.

(5) Refusal to receive evidence that Instructors, Thread Girls and other employees of respondent, held by the Board to be Supervisory Employees, were not so considered in trade unions generally, including the ILGWU itself, but were eligible to union membership.

One of the chief bases of the Board's decision against respondent is that the employees known as Instructors, Thread Girls, Head Pattern Maker (Mrs. Strickland) Head Cutter (Mr. Scoles), Examiners, and certain other employees, participated in the formation of the DGWU and were members of it and that their participation therein rendered that Union a dominated union, on the ground that such employees were "representatives of the management" (X, 3875-3878). To refute this finding or inference by the Board, the respondent sought to show by Wave Tobin, local manager of the ILGWU (X, 3788) and by the records of the ILGWU (X, 3790) and by Erwin Feldman, Counsel for many garment companies (X, 3791-2), that employees holding such or similar positions in garment companies, were regarded in trade unions generally, including the ILGWU, as *not* being Supervisory Employees but as being eligible to membership and participation in such unions. The relevance of this evidence for such purpose is apparent. In *International Assoc. of Machinists* v. *National Labor Relations Board*, 311 U. S. 72 (l. c. 80), this Court held that the test as to domination by alleged Supervisory employees was whether the employees generally "would have just cause to believe" that such alleged supervisory employees "were acting for and on behalf of the management." If employees in the garment industry generally *do not* regard such employees as supervisory employees and *do* regard them as eligible to join and participate in unions, those facts would have a bearing on the true status of such employees in the case at bar. It would also throw light on the credibility and effect to be given to the testimony of the employees and of respond-

ent's officers as to the status of such alleged supervisory employees (*Indiana and Michigan case, supra*, I, c. 24-27).

In fact, the Board itself has used this very type of evidence for this very purpose: In *Reid, Murdock & Company*, 56 NLRB No. 57, The Board said: "The Union has included keymen of similar work status in its bargaining contracts with the company's competitors." (And the Board in that case found such "keymen" *not* supervisors but "ordinary production and maintenance employees.")

Under the Board's own decisions in other cases, the instructors, thread girls, Rose Todd, Hobart Atherton, head pattern maker, Mrs. Strickland, Mrs. Gray, the inspectors, and similar employees, were not supervisory employees but were eligible to membership in the DGWU and their membership and participation therein does not constitute domination, coercion or interference by the management:

Ranco, Inc., 57 NLRB No. 82, decided July 20, 1944, was an *unfair labor practice* case, similar to the case at bar. The question was whether "group leaders" and "set up men" were supervisory employees. The "group leaders" were very much like the instructors in the case at bar—they *instructed* employees, *gave them work*, etc. The Board said:

> "The basic question to be determined in order to resolve the issues concerning interference, restraint, and coercion on the part of the respondent and domination of the Independent by the respondent is the alleged supervisory status of two classes of employees, namely, group leaders and set-up men. * * *
>
> "Group leaders *give work* to employees in the production or inspection line, *instruct* employees in their duties, ascertain whether they are supplied with work, obtain supplies and equipment for employees,

and at times engage in production work alongside ordinary employees.

"The record clearly establishes that neither group leaders nor set-up men have power *to hire, demote, or discharge employees, to grant raises or leaves of absence, or to recommend such action.* Their authority in this regard *is limited to reporting to their superiors;* either foremen or assistant foremen, the inefficiency of employees within their groups. * * * Although some employees testified that they regard set-up men and group leaders as their 'bosses,' the evidence establishes, in our opinion, that group leaders and set-up men perform no supervisory functions, being merely highly skilled employees, *and are not regarded as supervisors by the management, by the other employees, or by themselves.* Set-up men and group leaders were eligible to membership in both the Independent and the Union; several joined either one or the other organization. At the hearing, Lewis Strickland, the Union's International Representative, *admitted that group leaders and job-setters were members of the Union* and stated that their continued eligibility to membership was 'a matter for me to determine later on.' In view of all the evidence, we find that group leaders and set-up men were not supervisory employees. * * * We conclude that the respondent is not liable for their activities and statements."

In *Industrial Rayon Corporation*, 56 NRLB No. 104, decided May 15, 1944, the Board held that section *inspectors* and the *head inspector* in the cone packing department were *not* supervisory employees, saying:

"While they are responsible for the quality of the work produced, they do not supervise production employees *in the sense that they have the power to hire, discharge, lay-off, discipline or otherwise effect changes in their status.* Rejection by them of the work of the production employees does not have any

direct or significant effect upon the earnings of these employees; *they have no voice in determining or shaping the labor policy of the company.* It is clear, therefore, that *in the area of labor relations and policy,* these employees do not constitute management *in the eyes of the rank and file* as do truly supervisory employees."

(And to the same effect, see: *Dortch Stove Works, Inc.*, 58 NLRB No. 82; *Reid, Murdock & Co.*, 56 NLRB No. 57; *Yale & Towne Mfg. Co.*, 56 NLRB No. 193; *Land O'Lakes Creameries, Inc.*, 53 NLRB No. 170; *Castle & Cooke Terminals Ltd.*, 17 L. R. R. 859 (65 NLRB No. 175); *Godchaux Sugars Inc.*, 44 NLRB No. 981; *Western Union Tel. Co.*, 38 NLRB No. 1236; *Berkowitz Envelope Co.*, 38 NLRB No. 914.

Although respondent contends that the "Instructors," "Thread Girls," etc., were in no sense supervisory employees and hence properly participated in the Donnelly Garment Workers' Union under the foregoing decisions of the Board, now the Board has gone further and held that the same union may have affiliated locals of supervisors and of production workers. *Jones & Laughlin Steel Corp.* (United Mine Workers case), 17 L. R. R. 971, decided March 7, 1946 (66 NLRB No. 51).

The Court below was "not in error" in ruling that such offered evidence should have been received, and that respondent was denied a fair trial by reason of its exclusion.

The Board's Argument.

The Board argues at page 87 that such evidence offered by Respondent was not admissible, *first*, because not offered at the first Labor Board hearing and hence not included in the court's remand.

However, at the second hearing, Respondent offered this testimony *before* testimony was offered by the Board at that hearing (VII, 2508, 2520; VIII, 2522-2540). The Trial Examiner refused to receive it (VIII, 2540-2564) and withheld action on Respondent's offer of proof thereon (VIII, 2563). Then when the Board began putting on its testimony at the second hearing, the Board itself went into this very question. One of its main lines of questions was whether the Instructors were regarded as supervisors (IX, 3324-5, 3434, 3318; X, 3481, 3878), and, based on the three or four affirmative answers, it makes the finding (X, 3852) that "they regard themselves as supervisors and are so regarded by the operators." Thereupon it became academic whether the Respondent had offered this testimony at the first hearing—after letting the Board go into the matter, the Respondent was entitled to do so also. But the Trial Examiner still refused to let Respondent do so and rejected (X, 3782-3) its offers of proof (X, 3787-3792). This was palpably erroneous, especially in view of the adverse finding since made.

However, such evidence *was* within the remand of the court. The court in remanding the case did not attempt to set microscopic limits on the testimony to be received. It is well known to any lawyer or court that when a witness is called to the stand, the testimony given leads to further material and competent testimony. Here the Board at the first hearing had refused to permit Respondent to go into the question of whether from the employees' standpoint the DGWU was freely and voluntarily formed and administered. Had Respondent been permitted at the first hearing to pursue this inquiry, it would naturally have led to the disclosure that Instructors, Thread Girls, Head Cutters, etc., were not generally regarded as supervisory employes but were eligible to membership in garment company unions. When

the court remanded the case to permit Respondent to pursue this inquiry, it obviously intended that Respondent should be allowed some latitude in proving the facts which it had sought to prove in the first place, to show that there was no employee domination.

And since the Board in both decisions finds that Instructors, Thread Girls, etc., are supervisory employees, obviously the latitude should have included testimony tending to show that they were not generally regarded as supervisory employees, as that would tend to show no domination from that source. The court (123 F. 2d l. c. 222) says:

> "We have no doubt that the testimony offered * * * to prove * * * that the union was free from employer influence, domination and support * * * should have been received."

That this evidence was well within the contemplation of the court is further evidenced by the court's comments (p. 224) that a Trial Examiner should receive *all evidence offered* unless palpably incompetent and that "we say this in the hope of preventing a repetition of what occurred in the case now before us, and to obviate any misunderstanding as to what the attitude of this court is with respect to the taking of evidence in a hearing before a special master or a trial examiner."

But the Trial Examiner and Board gave no more heed to this admonition than they did to the court's mandate to receive and consider the employee testimony, discussed *supra*.

The excluded evidence in question was competent and material and should have been received and the court below was justified in refusing to enforce the Board's order reached in disregard of the remand and without benefit or consideration of this evidence.

The Board's argument (p. 88) that "parties shall not present their causes of action or their defenses piecemeal" comes with little grace from the Board considering the valiant but unavailing efforts and objections of Respondent, covering some 40-odd pages of the record (IX, 3276-3306, 3330-34, 3427-29, 3471-3, 3476-9; X, 3552, 3574-5, 3662, 3666, 3668-9), to obtain a ruling that the Board should not be permitted at the second hearing to re-present its case in chief.

Also the Board's argument (pp. 88-89) that the evidence was of "remote relevance" is likewise fallacious. The *Ranco* and other cases quoted, *supra*, decided by the Board itself, show beyond question the great relevance of this evidence. The *International Machinists* case and the other cases cited at page 89 are not to the contrary. Of course, the fact that Instructors, etc., are generally regarded as not being supervisory employes but as eligible to membership in unions, does not preclude the Board, in good faith, from finding an employer responsible for the acts of such employes if the circumstances so justify. Under the test in the *International Machinists* case an employer might be liable for the acts of his office boy if it had vested authority in him to speak and act for the management in labor matters. The Board (p. 90) virtually concedes the relevance and materiality of the excluded evidence when it says such evidence is not "controlling." But the fact that it is not controlling does not militate against the correctness of the ruling of the court below that the evidence should have been received and considered. The cases cited by the Board (pp. 89-90) are not to the contrary.

(6) Refusal to permit respondent to examine Wave Tobin as to threats and violence of ILGWU, and concerning eligibility of "Instructors," etc., to participate in unions, and generally.

The Trial Examiner refused to let respondent examine Wave Tobin *at all* (VIII, 2561-2-3; IX, 3257).

She was manager of the Kansas City locals of the ILGWU and was in direct charge of the strikes at the Gernes, Gordon, and Missouri garment plants in Kansas City in March and April of 1937. Her proffered testimony had a bearing on several phases of the case (see Respondent's offers of proof 1-SSSSS and 1-TTTTT, X, 3787-3790).

After first letting her testify for a short while the Trial Examiner stopped her testimony (VIII, 2543), ruling that he would "first" hear the 1,200 employees (VIII, 2556, 2561). But later he refused to let her be recalled to the stand to testify as to anything (X, 3257, X 3783), rejecting respondent's said offers of proof (X, 3782-3783), and struck out entirely the little testimony which she had given (IX, 3257). The Board's refusal to permit respondent to call and examine Wave Tobin therefore became not merely a ruling on the "order of proof," but the *total exclusion* of Wave Tobin as a witness, and hence was arbitrary, unfair, and contrary to all concepts of a fair trial.

The materiality of the offered testimony of Wave Tobin has been discussed under other points, *supra*, and we do not here repeat.

The Court was "not in error" in ruling that such testimony should have been received.

Rulings on Rebuttal Evidence, etc.

Respondent also urges that it was denied a fair trial by reason of the Trial Examiner's rulings on "rebuttal" evidence, at the second hearing.

The Board contends that it complied with the remand because it permitted Mrs. Reed and 11 employee witnesses to testify for respondent. But the Trial Examiner did not stop there, but *permitted the Board to introduce additional evidence which was not "rebuttal" but was additional evidence upon its case in chief.* Respondent objected strenuously to the trial examiner's thus opening up the entire case (see IX, 3276-3306, 3330-34, 3427-29, 3471-73, 3476-79; X, 3552, 3574-5, 3662, 3666, 3668-9), but without avail.

But that was not all. After permitting the Board and ILGWU to put on all the witnesses they had ("Miss Weyand: Well, I can't say until we finish with this witness, whether I will have *another* witness or not. Possibly I will not." X, 3687), to bolster their case in chief, the trial examiner not only held petitioner strictly to rebuttal of the Board's so-called "rebuttal" witnesses (X, 3712-13-14-15-16-17, 3721, 3726) but limited petitioner's rebuttal witnesses to three witnesses from each of two sewing sections (X, 3727-30, 3744-5), rejecting respondent's offers of proof.

It seems obvious that if petitioner was entitled to rebut the Board's rebuttal evidence at all, it was entitled to do so by any competent and material evidence which would tend to rebut it, *including witnesses from other sections* of the plant (III, 757).

The unfairness and prejudicial effect of thus restricting and limiting petitioner's evidence, consists in the fact that the Board's witnesses purported to testify as to *general* conditions in the plant, *e. g.* that union meetings were held during working hours (IX, 3312, 3430, 3551, 3666) and that employes were paid for time spent at union meetings, etc. Respondent was entitled to disprove the Board's rebuttal testimony by such a large number of employees

from *all over the plant* that it would be apparent that the testimony of the Board's witnesses should not be accepted.

Furthermore, after allowing the Board's rebuttal witnesses to cover practically all phases of the Board's case in chief, the trial examiner refused to let petitioner put on *any* evidence except *employee* witnesses (We refer to the proffered testimony of Erwin Feidman, Wave Tobin, the ILGWU contracts, etc.).

The Trial Examiner permitted Mrs. Reed to testify at the second hearing because she was unable to be present at the first hearing. He then struck out all of her testimony relating to events or conditions after the first hearing. The Board seeks to make it appear that this was at the suggestion of counsel for respondent, but respondent's only suggestion was that the evidence should be confined to the charges in the complaint (VII, 2 .2). The question arose because of the fact that during the cross-examination of Mrs. Reed by counsel for the Board counsel handed Mrs. Reed a document, Ex. 32A to 32D (XI, 4061, 4063, 4067, 4069) filed in the Wage and Hour Division, dated October 30, 1940, to which counsel had stapled on the inside (VII, 2283) another, wholly separate, Wage and Hour document, Ex. 32-E (XI, 4065) relating to a different date, making it appear that it was a part of the document dated October 30, 1940. Despite this, Mrs. Reed did not change her testimony, although she could not understand the contents of the second document being a part of the earlier document. Counsel for the ILGWU later continued the examination as to said exhibits (VII, 2454-2520). After the stapling together of the two documents was disclosed, and no evidence favorable to the Board was developed, the Board contended that all testimony relating to a period subsequent to the first trial should be stricken, and this was done.

We respectfully submit that as to each and all of the six items or types of evidence excluded, the Court below was "not in error" in ruling that it should have been received and considered by the Board, and further submit that if the Court was right as to *any one* of the six items or rulings, this Court should not disturb the decision.

(b)

THE COURT WAS NOT IN ERROR IN RULING THAT THE BOARD SHOULD HAVE DESIGNATED A DIFFERENT TRIAL EXAMINER FOR THE SECOND HEARING.

Respondent in its Application for Designation of Another Trial Examiner for the second hearing made a very strong showing that Trial Examiner Batten had prejudged respondent's most important evidence (A. 475, 483, 493). Batten's mind was completely saturated with the view that the testimony of the 1,200 employees concerned (as to "how and why" they formed and joined the DGWU and that they did so freely and voluntarily, without coercion) was completely *worthless* and immaterial. It was, therefore, impossible for him to fairly evaluate that testimony, as respondent was entitled to have it evaluated.

We do not take the space here to set out Batten's repeated assertions in the first hearing that he considered the employees' testimony completely worthless and immaterial. Many of his statements and rulings excluding this and other material evidence offered by Respondent are collected in Respondent's Application to the Board for the Designation of a different Trial Examiner (A. 474-493 inclusive), and show beyond question a state of mind and a fixed unalterable opinion toward Respondent and its evidence that disqualified him to sit as Trial Examiner in the second hearing.

This is not a situation (like mere erroneous rulings on admission or rejection of evidence), that might be corrected on appeal, for Batten's prejudice against Respondent and his prejudgment of Respondent's evidence *permeated every finding* that he made in his 40-page report to the Board and likewise permeated every finding of the Board, because the Board adopted his report *in toto*. Who can say that many or all of these adverse findings, and the conclusions based thereon, would not have been different if the evidence had been considered and evaluated by an impartial, unbiased Trial Examiner?

On appeal from the Board's last decision therefore, we were not (under this point), merely urging error in the rejection of evidence—we were asking the court below to correct an error that *went deeper*—to refuse to enforce findings which were *not fairly arrived at* because of the disqualification of the Trial Examiner who made them.

That Batten had *completely prejudged the case against Respondent* was *known* before the *second* hearing —it was not known before the first hearing. Therefore, when the case was remanded by the court to the Board for a further hearing, a *new* situation was presented. A trial examiner was designated to rehear the case who had *repeatedly and most vociferously* expressed his view that the evidence to be introduced was absolutely worthless and immaterial (II, 658, 614, 704f). He was now to "receive" it (due to the order of the Court) but his view as to its immateriality was not changed. A well-known proverb is apropos here: "You can lead a horse to water, but you can't make him drink." The court could make trial examiner Batten "receive" the evidence but it did not succeed in making him or the Board treat it as *material*, which is equivalent to refusing to receive it altogethe

The importance of the Trial Examiner's functions and the *prejudicial effect on Respondent* of Batten's redesignation are forcefully demonstrated by the fact that the Board adopted *verbatim* all of his intermediate report (save only for very minor correction, A, 620). The decision of the Board which we are opposing *is to all intents and purposes* the findings and decision of Batten, and his prejudgments and prejudices are carried forward in full into the Board's decision and order. When Congress provided for hearings before an agent, designated by the Board (29 U. S. C. A., Sec. 160), it contemplated a hearing by an *impartial* agent or trial examiner. The courts have commented on the fact that since the Board is both prosecutor and judge, special care should be taken to insure an impartial trial (*NLRB* v. *Sands Mfg. Co.*, 96 F. 2d 721, l. c. 726-7; *NLRB* v. *Western Cartridge Co.*, 138 F. 2d 551, l. c. 552-3; *NLRB* v. *Washington Dehydrated Food Co.*, 118 F. 2d 980, 997; *NLRB* v. *Indiana M. & E. Co.*, *supra*; Cf. *Borchard* v. *California Bank*, 310 U. S. 311, 316-17).

The Board did not follow these precepts here, but deliberately redesignated Batten over respondent's strenuous protest (A. 474-493, 502-3), thereby denying to respondent a fair trial.

It is impossible to read this record and the two intermediate reports of the Trial Examiner without being convinced that he, and through him the Labor Board, have closed their eyes to all evidence favorable to Respondent and considered only the evidence favorable to the Board's and ILGWU's position. For example, in both his intermediate reports, the Trial Examiner finds that there was no meeting of employees held on or about March 30, 1937 (A, 520, X, 3873, footnote 42), although all employes permitted to testify

testified that they actually attended such meeting and related what occurred at the meeting, and an offer of proof was made that the remaining employees would testify to the same effect (III, 760). This finding was made despite the fact that *no person testified to the contrary.* The reason for this amazing finding is not hard to find: At this meeting the employees agreed to contribute 50c apiece to finance the employment of Mr. Tyler as attorney for the employees. Such fact *destroyed the Trial Examiner's pet theory* that the Loyalty League furnished this money. So the Trial Examiner, in order to get around this difficulty, adopted the convenient expedient of merely ignoring all such testimony and finding that there was no such meeting!

He even went so far as to find that the March 2nd statement was a part of the Loyalty League's plan (A. 516), although there is no evidence at all that the Loyalty League had anything to do with the March 2nd statement. The Trial Examiner's treatment of Respondent's evidence here is well described by the 5th Circuit in *NLRB* v. *McGough Bakeries Corp.*, 153 F. 2d 420 (l. c. 421-422):

> "The intermediate report of the trial examiner seems to us more like a trial argument than a judicial deliverance. Every issue without exception he found in favor of the Union. He resolved every conflict in testimony, whether serious or trivial, in favor of the Union. With complete consistency he found every witness for the Union reliable and truthful, and every opposing witness whether the Company's president and supervisors, or Independent's adherents, untruthful and unreliable. Even witnesses called by the Board were reliable when they testified favorably to the Union, but otherwise not reliable."

The Court below is entitled to some latitude and discretion in determining whether it shall enforce an order

of the Board upon a hearing so conducted (*Indiana and Michigan case, supra*, l. c. 28). It was not merely a question of Batten's erroneous rulings in the first hearing, which could be reviewed on appeal; it was a question of "preventing his future action in the pending cause" (*Ex Parte American Steel Barrel Co.*, 230 U. S. 35, l. c. 44) when he had pre-judged the case. Here the circumstances amply justify the Court's ruling that the Board should have appointed a different Trial Examiner for the second hearing, and the Court's refusal to enforce the Board's order was proper (*NLRB* v. *Henry K. Phelps, Jr., Trustee*, (5 C. C. A.) 136 F. 2d 562, l. c. 566-7; *NLRB* v. *Washington Dehydrated Food Co., supra*).

The Board's Argument.

The Board in its brief presents no answer to the foregoing. It cites *American Steel Barrel Co., Ex parte*, 230 U. S. 35. That case is authority for Respondent's position rather than for the Board's position, for in that case this court held (l. c. 43-44):

> "The basis of the disqualification * * * was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, *but to prevent his future action in the pending cause.*"

That is precisely what Respondent sought here, in asking for a different Trial Examiner at the second hearing—to prevent Batten's "future action in the pending cause."

Nor does the Board's argument that, in theory, the Board may "accept some or reject all" of the Trial Examiner's findings and recommendations correct the error in redesignating Batten here. Even if it may reject the Trial Examiner's report that does not mean that Congress in-

tended that employers must submit their cases before a Trial Examiner who has prejudged the case against them.

The Board here knew from Respondent's protest that Batten would not and could not give a fair, unbiased hearing to Respondent's evidence. It knew, therefore, that it would be deprived of the benefit of a fair, unbiased report. Assuming, therefore, that the Board (after receipt of the Trial Examiner's report) should try "in good faith" to determine the case fairly, it could not from any *realistic* standpoint do so, for it must and does depend largely on the Trial Examiner's findings and conclusions, as is conclusively shown here by its adoption of Batten's report *in toto*.

The familiarity of Batten with the prior record (p. 84) is small reason for denying a litigant a fair hearing.

(c)

IN ANY EVENT, THE COURT'S RULINGS WERE NOT SO COMPLETELY WRONG AS TO CONSTITUTE AN ABUSE OF ITS JUDICIAL POWER AND DISCRETION.

But even if the Court below was "in error" in its determination as to the materiality of one or more, or even all, of these matters, nevertheless this Court should not disturb the decision unless the Court below in so ruling *was so completely wrong* as to constitute an abuse of its discretion and power.

As said in the *Indiana and Michigan case, supra*, l. c. 16, the Court below must "not only have been in error" but must also "have abused its judicial discretion," to warrant this court in reviewing its decision.

Congress in setting up the procedure under the National Labor Relations Act vested in the Circuit Court of Appeals the power and discretion of determining (under certain limitations) whether the Board's order should be enforced. It was not contemplated by Congress that

every decision by the Circuit Court of Appeals should be reviewed by this court. Congress was familiar with the policy of this court that it would not ordinarily review on certiorari decisions of the Circuit Court of Appeals except those falling within the scope of Rule 38 of this Court, and, with that knowledge, Congress made no further provision for review by this court of Labor Board cases. A wide latitude of discretion must be allowed to the Circuit Court of Appeals in passing upon such matters, and within such wide range the Circuit Court's discretion and determination as to matters such as those involved here, should be accorded finality in enforcement cases and not be disturbed by this court on certiorari, except for abuse of discretion.

The case at bar comes especially within that range for the court below has, in good faith, exercised its power and discretion upon six different types of evidence and upon the qualifications of the Trial Examiner, as well as upon the Board's refusal to obey the spirit or letter of the Court's first remand, and has refused to enforce the Board's order. In so doing it has not abused its discretion, "even though in this court's view such evidence would be a matter of indifference," or this court might have reached a different conclusion (*Indiana and Michigan case, supra*, l. c. 16).

In the review of Labor Board cases, the Circuit Court of Appeals acts in accord with equitable principles.

In *Ford Motor Co.* v. *NLRB*, 305 U. S. 364, 373, the court says:

> "The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, *it may adjust its relief to the*

> *exigencies of the case* in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself—to secure a just result with a minimum of technical requirements."

The court below acted in accordance with equity and good conscience in refusing to enforce the Board's order. Here is an employer (Respondent) which has consistently striven to comply with both the spirit and the letter of the National Labor Relations Act; its treatment of employees has always been of the best, and when they organized a union under the National Labor Relations Act and demanded recognition, Respondent dealt with them in full compliance with the Act. It was unjust to subject Respondent to the great expense of a third trial before the Labor Board with no assurance that the Board would, the third time, give any greater consideration to Respondent's evidence than it had done in the first and second hearings. The same applies to the employees (DGWU)—who, instead of being accorded the benefits of the Act by the tribunal designed for that purpose, have been forced by that tribunal to engage in expensive litigation for a period of 9 years to achieve and retain the rights expressly guaranteed to them by the Act. How many times should a court return a cause to a lower tribunal or court which flaunts its mandates? The language of the 5th Circuit in *National Labor Relations Board* v. *McGough Bakeries Co.* (l. c. 421) is applicable here:

> "It is our duty, as well as the Board's, to see that the Act is properly and fairly applied, and not brought into disrepute by unlawful or palpably unjust applications of it."

In *NLRB* v. *Prettyman*, 6 Cir., 117 F. 2d 786, the Court said, l. c. 791:

"The Court is not compelled to enforce an order of the Board which is impregnated with a hearing not comporting with the standards of fairness inherent in procedural due process."

To the same effect see *NLRB* v. *Newberry L. & C. Co.*, 123 F. 2d 831, l. c. 838; *Inland Steel Co.* v. *NLRB*, 7 Cir., 109 F. 2d 9, l. c. 20-21.

In view of all the circumstances here involved—the unanimous choice of the DGWU by respondent's employees; the steadfast adherence of the employees to that choice for 9 years; the meagerness and circumstantial nature of the testimony relied on by the Board as showing coercion, and the overwhelming direct testimony to the contrary; the two long and expensive hearings to which Respondent has been subjected; the twice-repeated failure of the Board to permit Respondent to introduce material evidence; and the refusal of the Board to obey the spirit of the court's remand to consider *as material* the evidence which the court had held to be material—the court was amply justified in the exercise of its equity powers and the power and discretion vested in it by the National Labor Relations Act, in refusing to enforce the Board's order.

We respectfully submit that if the court below was to "adjust its relief to the exigencies of the case" and "secure a just result with a minimum of technical requirements," it chose the right course. Equity demands that the respondent have surcease from this unjustified prosecution. The judgment should be affirmed.

PART TWO.

From the foregoing, we feel that the court is justified in affirming the decision below without going into the merits. But there is an additional and even more potent reason why the decision of the court below should be affirmed; namely, that the Board's order is not supported by the evidence.

The court below did not pass on that phase of the case (XIII, 37). We understand that ordinarily this court does not rule on questions of fact which have not been passed upon by the court below (*Manufacturers' Finance Co.* v. *McKey*, 294 U. S. 442, l. c. 453-4; *Nashville C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405, l. c. 432-3; *Hecht Co.* v. *Bowles*, 321 U. S. 321, l. c. 331), but we assume that the court has power to do so and in some instances has done so (*Ecker* v. *Western Pacific Ry. Co.*, 318 U. S. 448, 489). As the court in granting certiorari herein placed no limitations on the matters to be reviewed, we now present this phase of the case:

I.

The Board's Findings, Conclusions and Order Are Not Supported by the Evidence.

A.

The DIRECT Evidence Is OVERWHELMING That Respondent's Employees Formed and Operated the DGWU of Their Own Free Will and Accord Without Coercion or Interference by Respondent.

This is not a case where the employees of a company are about evenly divided upon the choice of a union or bargaining representative—where slight influence by the employer might tip the scales one way or the other. It is not even a 70-30% or 90-10% division—here *all* of the

1300-odd working employees of respondent (excepting possibly two or three employees) wanted the DGWU as their union and bargaining representative and they unanimously formed and joined that union on or about April 27, 1937 (I, 80b). The organization of the DGWU was so decisive and spontaneous as to leave no doubt that the employees wholeheartedly wanted and chose that union as their bargaining representative. Practically all of the 1300-odd employees of respondent joined the union at a meeting held on April 27th. A few employees, not present at the meeting, joined a few days later (I, 80b, 80c). It may be fairly said, therefore, that the DGWU was the unanimous choice of the working employees of respondent.

That the DGWU was not only the unanimous but was the *voluntary* choice of the employees, without coercion or interference on the part of the respondent, is also shown by *overwhelming* evidence. As practically all of the employees joined the DGWU at the April 27th meeting, and as there is no appreciable conflict in the evidence as to what occurred at that meeting, the court will readily see, from a review of the evidence concerning that meeting, that the evidence is overwhelming that the employees wanted that union and formed and joined it of their own free will. Respondent in the first hearing desired to call as witnesses as many of the employees and members of the DGWU as the Trial Examiner would permit, and let them testify as to whether they formed and joined the DGWU of their own free will and without coercion or interference by respondent. Respondent called the employees as witnesses until stopped by the Trial Examiner and all who were permitted to testify on the subject testified that they joined the DGWU voluntarily as their free choice without any coercion or interference on the part of respondent or its management. However, the

Trial Examiner held that this testimony was immaterial and refused to receive or consider it, and it was because of such refusal that the Court below remanded the case on the first appeal. When the Trial Examiner refused to hear the testimony of further employees, respondent offered to prove by all available employees and members of the DGWU that they joined that union of their own free will without any coercion or interference by petitioner or the management (See Board's exhibit 1-OOOO, R. III, 743.[1] This offer of proof was rejected by the Trial Examiner.

On the second hearing, in pursuance of the court's remand, respondent again called the employees as witnesses (until stopped by the Trial Examiner) to obtain their testimony which the Trial Examiner had refused to receive at the first hearing, and all such employees testified that there was no coercion or interference by respondent or its management regarding their union affiliations, but that they formed and joined the DGWU of their own free will and desire. When the Trial Examiner stopped respondent from calling further employees as witnesses, respondent renewed its offer as contained in

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[1] By said offer of proof, petitioner offered to prove by said witnesses (among other things) the following (III, pp. 755-756-757):

"That he (or she) joined the Donnelly Garment Workers' Union of his own free will and accord, uninfluenced by the Donnelly Garment Company or Donnelly Garment Sales Company or by any officer, executive or supervisory employee thereof, or by anyone representing the management of said companies; that since said time he has continued to belong to and support said Donnelly Garment Workers' Union of his own free will and accord, uninfluenced by the management of said companies or by anyone representing the management of said companies; * * *

"That he does not know of and has never heard of the Donnelly Garment Company or Donnelly Garment Sales Company, or any officer, executive, supervisory employee or anyone representing the management of said companies, doing or saying anything either prior or subsequent to the formation of the Donnelly Garment Workers' Union on April 27, 1937, calculated or tending to encourage, promote or foster membership in the Donnelly Garment Workers' Union or in any 'plant union' or tending to discourage membership in the International Ladies Garment Workers' Union or local thereof. * * *"

Board's Ex. 1-OOOO, to make similar proof by all of the available employees (IX, 3265), and 1-VVVVV (X, 3792-3).

This, we respectfully submit, constitutes *overwhelming direct* proof that there was no coercion or interference by respondent or its management, with respect to the choice of a labor union by its employees, as the proof offered was direct testimony of the *very persons* whom the Board claims were coerced, that they were *not* coerced but acted of their own free will in forming and joining the DGWU. This is the highest and most potent evidence that could be produced on that issue. If any coercion was used upon the employees, they certainly are the ones who would know about it.

Not "Conclusionary" Evidence.

Nor was this "conclusionary" evidence, as it is referred to by the Board (A. 619). It is testimony as to *facts*. The witnesses were asked, not only, "did you join the DGWU of your own free will," but were asked questions such as these: "Did any officer, executive or anyone that you thought was representing the management talk to you about the meeting?" (of April 27th) (VIII, 2565); "Now, prior to that meeting, had anyone, any officer, executive, or anyone representing the management suggested to you or suggested to anybody else in your presence that the employees form a union?" (R. VIII, 2566); "Now, at any of these meetings that you have described, did your instructors request you to attend the meetings?" (p. 2571); "Did any official, executive, or representative of the management request you to sign the petition?" (of March 2nd) (p. 2578); "Did the instructor ask you to sign the petition?" (p. 2579); "Did you gain the impression from any source, or did you understand that the Loyalty League had anything to do with the formation of the Donnelly

Garment Workers' Union?" (p. 2582); "Did you ever hear anybody in the factory say that Rose Todd represents the employers about labor matters?" (p. 2593) etc., etc. *The answers to all these questions were in the negative.* Those and many other similar answers constituted testimony as to *facts,* not conclusions.

But we also submit that the answers that the employees "joined the DGWU of their own free will and without coercion on the part of the respondent" is testimony as to a *fact—i. e.* the state of mind of the witnesses—and as to the *fact* that such state of mind was not created by duress of respondent. Furthermore, this *fact* (whether any pressure was brought to bear on the witness to cause her to join the DGWU) was a fact as to which she was the most qualified person in the world to testify, and her testimony as to such fact ought to be held to be *conclusive* (*i. e.* the purpose of the NLR Act is to permit employees to join any union *they* want to join—when *they* say "this is the union we want," that ordinarily should end the matter—the only exception, of course, being proof of a "prior" company-dominated union, or such direct and positive evidence as to negative the employees' statement, neither of which exists here).

We respectfully submit that the Board is in error in deeming this evidence of the employees to be merely "conclusionary," and has committed even more flagrant error in treating it as "immaterial"—as such action by the Board is equivalent to a refusal to receive the evidence at all.

That the DGWU was the voluntary choice of all the employees is further shown by the affidavits, made in the months of May and June, 1939, and signed by some 1,195 employees and members of the DGWU, which affidavits were offered in evidence as Intervener's Exhibit 20A to 20KK (rejected). This exhibit appears in the record (R

VI, 1677 *et seq.*),[2] where the actual signatures of such employees, sworn to before a notary public, appear.

Also at page 783, Volume III of the Record, the interveners offered to produce and examine, under oath as witnesses, the 1,165 persons who signed the affidavits (Exhibit 20A to 20KK) and to prove by said witnesses "that they joined and have at all times remained members of said Donnelly Garment Workers' Union of their own free will and without coercion, intimidation, or other influence of their employer."

This offer of proof was renewed by intervener in the second hearing when the Trial Examiner refused to let intervener put on any witnesses (IX, 3264).

The various offers of proof of testimony by the employees and members of the DGWU appear at III, 743 to 795, inclusive, and 1-VVVVV, X, 3792-3, and cover many other matters tending to show that there was no coercion or interference by respondent.

In addition to the foregoing *direct* testimony by the persons who would have been influenced or affected by coercion (if there had been any coercion) the testimony as to the circumstances and action taken at the April 27th meeting (at which the DGWU was organized), shows that the formation of the DGWU was the voluntary action of those present—and since practically all of the working employees were present at that meeting, and since all necessary action toward forming the union was

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[2] Said affidavits, Exhibit 20A to 20KK, contained the following language:

> "We, the undersigned employees of the Donnelly Garment Company and the Donnelly Garment Sales Company of Kansas City, Missouri, below the rank of officer or any position carrying with it the right to employ or discharge, *again reassert under oath that it is their free, voluntary, and considered wish and choice* to belong to the Donnelly Garment Workers' Union and not to the International Ladies' Garment Workers' Union or any other union."

taken at said meeting, the circumstances of said meeting, disclosed by the minutes and by the direct testimony, constitutes well-nigh conclusive proof that the DGWU was the free choice of the employees, as there is no appreciable discrepancy in the oral testimony as to what occurred at that meeting. The minutes of the meeting of April 27, 1937, are in evidence at III, 821. There is substantial harmony between the minutes and the testimony of the Board's, respondent's and intervener's witnesses as to the substance of what occurred at said meeting.

In addition to the testimony of the employees that there was no coercion, respondent's officials (Lee Baty, Production Manager, Mrs. James A. Reed, President, Mrs. Reeves, Merchandise Manager, Mr. Keyes, General Sales Manager) testified that there was no coercion or interference by the management with respect to the union affiliations of the employees.

In addition to all the foregoing—and confirmatory thereof—the DGWU had continued for 5 years at the time of the last hearing (now 9 years), as the active and satisfactory choice of the employees as their bargaining agency. Had it not been their voluntary choice, it would have long since been uprooted by the employees, who in these days are not at all timorous, either in Texas or Missouri, in asserting their rights and desires.

(In the case of *Humble Oil & Ref. Co.* v. *NLRB*, 113 F. 2d 85, l. c. 92, the Court, in speaking of the independence of employees said "Texans have never been remarkable for timorousness.")

In opposition to this overwhelming array of witnesses and evidence that the respondent did not coerce or interfere with its employees in the formation of the DGWU, the Board in the first trial was able to produce as witnesses only two former employees, May Fike and Elsa Lou Greenhaw. (Rose Todd, called by the Board, testified that the

employees formed the DGWU of their own free will; Bertha Estes was called by the Board merely for the purpose of inquiring whether the Loyalty League kept minutes; Pauline Hartman, called by the Board, was not asked about the formation of the DGWU but was examined with reference to activities and expenditures of the Loyalty League; and Jack McConaughey, called by the Board, was examined only with respect to the books of account of the DGWU.)

May Fike did not testify to any coercion at the April 27th organizational meeting. Her testimony appears in I, 328c-331. Her testimony shows that cards were passed out and the employees voted to form the DGWU, and the rest of her testimony does not vary substantially from the minutes or other testimony as to what occurred at said meeting. At page 328D, she testifies that the instructor in her section notified the operators of the meeting: "A. She sent everybody to the second floor, she said there was going to be a meeting and everybody should stay in a body so we could get back to work together, or something like that." This is the only intimation in May Fike's testimony that even smacks of coercion. She does not indicate that the instructor or anyone else suggested what action she should take with reference to the formation of a union, and her testimony that the instructor "sent" the operators to the meeting is contrary to the testimony of all of respondent's and intervener's witnesses. Of course, respondent contends not only that May Fike's testimony (that the instructor purported to "send" the employees to the meeting of April 27th) was false but also contends that the instructor did not represent the management in any event. In another part of this brief we have discussed the unreliability, generally, of May Fike's testimony. Even the Trial Examiner deemed her testimony so unreliable that he refused to recommend her reinstatement (X, 3891-2).

Elsa Lou Greenhaw gave no testimony concerning what happened at the April 27th meeting. At p. 354-d, Volume I, she testified that she was notified of the meeting by Miss Alexander: "A. Yes. *Somebody* in the department asked us to go to the second floor for a meeting." Mrs. Greenhaw, however, did attempt to testify that there was coercion on the part of the management, but when asked to tell what the coercion was and to name the persons who engaged in coercion, she was unable to do so except to testify as follows: She testified with respect to Mrs. Reeves (I, 370) that Mrs. Reeves said nothing to her personally and that she did not personally see her engaged in any coercion with other employees; with respect to coercive statements by Mrs. Keyes, she testified p. 373, Volume II: "A. Well, there were a number of statements. One I remember particularly about the employees being careful with their voting. Q. Voting for what? A. During the general election in 1936." As to the alleged coercion of Mr. Keyes, she testified p. 378G, Volume II: "A. The incidents I recall particularly happened during the summer of 1936 when Mr. Keyes called several employees in to reprimand them for their work, and they had been working at such a high rate of speed, top speed, that they were so nervous they didn't know what they were doing and they burst out crying * * *."

Even the Trial Examiner held that the alleged coercion as to voting in the general election of 1936 and the reprimand concerning work in 1936 had nothing to do with the issues in this case (II, 378G).

Although the Trial Examiner in his first Intermediate Report relied greatly on the testimony of Mrs. Greenhaw, as having given her testimony in a "straightforward and unhesitating" manner (A, 519), the Board recognized the weakness and unreliability of her testimony and prac-

tically ignored it, as did the Trial Examiner also in his second Intermediate Report, and the Board in its final order and decision. The respondent will gladly welcome a reading of Mrs. Greenhaw's testimony by the court which will disclose her extreme animus toward respondent, the evasiveness and unreliability of her testimony (I, 369-372, II, 373-375), and that her testimony as given constitutes no proof of any charge in the complaint.

At the second hearing, the Board called six additional former employees of petitioner—Etta Dorsey, Lola Skeens, Geneva Copenhaver, Bessie Weilert, Margaret Keyes and May Stevens.

None of these witnesses testified to any direct coercion or influence brought to bear on them or upon any other employees by respondent with respect to joining the DGWU or as to their union affiliations in any way. Their testimony relates wholly to "circumstances" from which the Board seeks to infer domination. If there had been any actual coercion they would certainly have testified about it. The fact that they didn't is most potent evidence that there was none. The "circumstantial" evidence should be considered in the light of this fact and when so considered it becomes most evident that the Trial Examiner and Board's findings are not justified, but are based wholly on conjecture and desire to convict rather on the evidence.

Etta Dorsey did not testify as to any coercion or interference by respondent either upon her or upon any other employee with respect to joining the DGWU. On the contrary, on cross examination she testified that the statements in her affidavit (Intervener's Exhibit 20A to 20KK), to the effect that the DGWU was her free and voluntary choice, were true (VI, 1675). Her testimony related principally to alleged "circumstances" from which

the Board attempts to "infer" coercion. In appraising Mrs. Dorsey's testimony, it should be noted that she was "mad" at the Donnelly management. She testified (IX, 3364) that she "quit in March of this year because I was not treated right," and that "I was mad at some of the people down there, they didn't treat me right." "Well, that Cecile Ealy is a snake in the grass." "Well, I will admit I got a little mad at Mrs. Reed because she didn't hear me * * *." "Q. You were mad and venomous about this whole matter, weren't you? Just boiling mad, aren't you?" "A. Yes, when her name (Cecile Ealy) comes up it makes me mad."

Lola Skeens likewise, did not testify to any coercion by respondent as to herself or as to any other employees as to forming or joining the DGWU. On the contrary, she testified that the statements in her affidavit (Intervener's Exhibit 20A to 20KK) were true (IX, 3462), that the DGWU was her free and voluntary choice.

Mrs. Skeens' testimony, also, related only to alleged "circumstances" which the Board claims show coercion.

The evidence regarding these alleged "circumstances" is discussed later in this brief.

Attention is also called to the fact that Mrs. Skeens quit her employment at the Donnelly plant because she was peeved over a change in her work which the management asked her to make (IX, 3463).

Geneva Copenhaver testified to no acts or words of coercion by the management but testified (IX, 3471) that she signed the membership card at the April 27th meeting because "I *felt* like I had better, if I wanted my job," but she later testified that the statements in her affidavit (Intervener's Exhibit 20A to 20KK) were true to the effect that she joined the DGWU "under our own free will" and that "the company never intimidated me one way or the other * * *" (pp. 3492-3).

Bessie Weilert testified (X, 3580-81) that at the time the DGWU was organized, she thought it was formed by the employees for their own benefit but that she later changed her mind and formed the opinion that it was company-dominated. However, she testified (pp. 3592, 3601) that she was satisfied with the DGWU and believed it was representing the wishes and interests of the employees, until she was elected on the committee in 1939. So, *for two years* after the formation of the DGWU she evidently saw no signs of domination. She also testified (p. 3614) that in 1939 when she signed intervener's offer of proof (Exhibit 1-RRRR), she was of the opinion that the union was the free will choice of the employees, "as far as I knew about it then." She testified to no acts or words of coercion by petitioner but when asked about her affidavit (Intervener's Exhibit 20A to 20KK), she testified that she "didn't *feel* that way" and when asked if she swore to something that was not true in that affidavit, she answered, "It seems that I did" (pp. 3594-5).

It appears from page 3578 and from Mrs. Weilert's testimony, generally, that she was "peeved" at the management, and that she quit her employment because she was asked to do some repair work.

Margaret Keyes testified to no coercion and, in fact, testified (p. 3660) that "I knew nothing whatsoever of the union activities in the Donnelly Garment Company, * * *"

May Stevens testified to no acts or words of coercion by the respondent but testified (X, 3667) that she signed the membership card at the April 27th meeting because "I *felt* that I had to do it to hold my job." However, she made affidavit in 1939 (Intervener's Exhibit 20A to 20KK) that it was her "free, voluntary and considered wish" to belong to the DGWU. On the stand, she testified that the affidavit was false when she swore to it (pp. 3692-3) and that she knew when she made the affidavit that she was

swearing to a false affidavit (p. 3703). Also, in 1939, she signed intervener's offer of proof (Exhibit 1-RRRR), stating that she joined the DGWU of "her own free will" and had "not been influenced by any threats, coercion or pressure" of the employer, or any representative of the employer. On the stand, she testified that at the time she signed said offer of proof, it was false (p. 3690).

Summing up the Board's direct testimony, attention is called to the fact that at least five of said witnesses for the Board (May Fike, Elsa Lou Greenhaw, Etta Dorsey, Lola Skeens and Bessie Weilert) had a personal grievance against the Donnelly Company and that the sixth, Mrs. Keyes, testified that she "knew nothing whatsoever of the union activities"; and that five of said witnesses (Etta Dorsey, Lola Skeens, Geneva Copenhaver, Bessie Weilert and May Stevens) had previously made affidavits under oath, as to the DGWU "being their free choice";

This constitutes substantial impeachment of the credibility of the Board's chief witness, with no impeachment of the 1,200 employees testifying to the contrary.

The Board offered no other direct testimony of coercion or interference. The rest of the Board's testimony deals with alleged "circumstances" which it claims constituted domination and interference. All this testimony is circumstantial and respondent contends that the alleged inferences drawn by the Board therefrom are based on suspicion; conjecture and surmise and not on any substantial evidence of domination or interference by the respondent, and do not rise to the height of legitimate inferences, especially in view of the contrary overwhelming *direct and positive* testimony on the part of respondent's employees that there was no coercion, and in view of the fact that even the Board's witnesses did not testify to any direct acts or words of coercion upon them.

Also, the minutes (III, 821) and testimony as to just what occurred at the organization meeting on April 27th, show conclusively that there was no coercion or interference by respondent in the formation of the DGWU but that it was voluntary to the *Nth* degree.

The testimony of the Board's witnesses as to the alleged "circumstances" on which the Board relies (such as that the DGWU meetings were held during working hours, etc.), is greatly weakened on cross examination and is contrary to respondent's "1200 witnesses" and we contend does not impinge upon the overwhelming and conclusive *direct* testimony that there was no coercion.

We believe that it may be fairly stated that the *direct* testimony is *overwhelming*—we feel it is *conclusive*—to the effect that the employees formed and joined the DGWU of their own free will and without any coercion or interference by respondent; and unless the Board's "circumstantial" evidence is so strong as to justify the *overriding* of this overwhelming direct evidence, we respectfully submit that the Board's order should be set aside.

We now proceed to a discussion of the "circumstantial" evidence upon which the Board relies.

B.

The "Circumstantial" Evidence of the Board Is Also Contrary to the Overwhelming Direct Testimony and Does Not Support the Board's Findings and Conclusions.

It might not be amiss, here, to state that even as to this "circumstantial" evidence on which the Board relies, the *direct* testimony is *overwhelming*, either that the circumstances were *not* as the Board finds them, or that they were not *attributable* to respondent; and in any event, that they were *not coercive*; and hence, that *even the* "cir-

cumstantial" evidence does not support the Board's findings and order.

In the absence of "direct" coercion (and faced with the universal testimony of the employees themselves that there was no coercion), the Board seeks by evidence of isolated, miscellaneous incidents and circumstances to discover a basis for finding respondent guilty, notwithstanding respondent's clear and complete exculpation by the very persons concerned, namely the employees—whose right to choose their own union the Labor Board should seek to uphold instead of to destroy.

The "circumstances" on which the Board relies wholly fail to measure up to the standard of "substantial" evidence, as enunciated by the Courts, being founded on "a hodge podge of suspicious, farfetched inferences and pure guesses" as the Court described the evidence in *NLRB* v. *International Shoe Co.*, 116 F. 2d l. c. 37, on which the Board made similar findings.

We now discuss the various "circumstances" in detail:

B-1.

The Board's Findings and Conclusions As to the March 18th Meeting and As to Mrs. Reed's Remarks at Said Meeting, Are Not Supported by the Evidence.

On March 18, 1937, the employees, of their own volition, called a meeting of the employees, to see what they could do to protect themselves against threatened violence such as was being visited by the ILGWU upon employees of other garment plants in Kansas City. (II, 553). The meeting was held after working hours, on property not leased or occupied by respondent (II, 553, 559; X, 3867, footnote 34).

The Board finds that the March 18th meeting of employees was held "during working hours" (and makes the

same finding as to the organization meeting of the DGWU held on April 27th, R. X, 3867, note 33).

We take up this finding first because we wish to discuss this finding *in extenso* because similar considerations apply to most of the other findings made by the Trial Examiner and Board throughout the decision.

This finding (and the similar finding as to the April 27th meeting) is contrary to the overwhelming testimony in the case. All of respondent's and intervener's witnesses who testified on the subject, testified that the meeting was held *after working hours*, and respondent and intervener offered to prove, by the testimony of the remaining 1100-odd employees who attended the meeting, that it was held after working hours (Exhibit 1-OOOO, III, 759).

The employees whom the respondent was permitted to call, testified that the meeting of March 18th was held after working hours:

> "A. Well, it was after working hours. I don't remember just what time the working hours were. It was after 4:00 or 5:00, any way, I know, it was after we quit work" (Oma Lee Cooper, VIII, 2569).
>
> "It was after I finished work; and I was working then—got off at 4:30, and it was after I finished work, but I went down before I dressed" (Louise Garrett, VII, 3124).

To the same effect:

Hazel Saucke, VIII, 2627; Edith Dean, 2854, Jessie Mudd, 2920; Ethel Riegel, IX; 3009; Lydia Phillips, 3081; Alice Freed, 3189.

Also, *highly significant* is the fact that in the first Intermediate Report of the Trial Examiner (A, 510 *et seq.*) and in the first decision of the Board (A, 552, *et seq.*), they *did not find* that either of the meetings of March 18th and

April 27th was held during working hours—but the Trial Examiner *affirmatively* found (A, 526): "The April 27th meeting was called immediately *after work* * * *."

Now, the Trial Examiner and Board find that both meetings were held "during working hours"—and this in the face of the testimony and proffered testimony to the contrary of 1200-odd employees who were there.

Opposed to this overwhelming proof, is the testimony of the Board's five or six witnesses that the meeting was held about 2:00 to 3:00 in the afternoon.

We are cognizant of the rule that "the credibility of witnesses and the weight of the evidence" are for the Board, not the courts. But we do not understand that rule to mean that the Board may "arbitrarily" ignore the positive testimony of a thousand witnesses and accept that of a half dozen, when there is no basis for a conclusion that the thousand witnesses are giving perjured testimony. Such a rule would make the entire administration of the Labor Relations Act a mere farce—for there would always be some witness which the complaining union could scrape up, who would testify to *some* fact from which the Board would make a finding of guilt, unless some effect is given to the contrary evidence. The courts have recognized this and have not left the Board entirely unbridled in this respect:

(1) The courts have ruled that the evidence on which the Board bases its findings, must be so "substantial" that "a reasonable mind" might accept it as "adequate" (*NLRB* v. *Columbian E. & S. Co.*, 306 U. S. 292, l. c. 300).

What reasonable mind could believe that a meeting of employees took place during working hours, if 1,200 persons who attended the meeting say that it occurred after working hours and five or six say that they think it was during working hours?

It seems absurd to think that Respondent, if it were secretly promoting the plant union, would have been so bungling as to permit meetings for that purpose to be held during working hours (see quotation from *NLRB* v. *Mathiesen Alkali Works*, 114 F. 2d 796, 803, quoted *infra*).

Courts are entitled to "weigh" the evidence to the extent of determining whether the evidence which the Board relies upon is "substantial" (*Wilson & Co.* v. *NLRB*, 126 F. 2d 114, 116; *NLRB* v. *Reeves Rubber Co.*, 153 F. 2d 340, 342). Otherwise, a court could *never* say the Board's findings were not supported by the evidence. And whether or not the evidence the Board relies upon is substantial, depends on what the countervailing evidence is.

(2) The Board may not completely disregard material evidence in arriving at its findings.

It is conceivable that there might be evidence sufficient to support a finding by the Board, *in the absence of any contrary evidence.* But it is also obvious that the same evidence might not support a finding by the Board where there was countervailing evidence of such a nature as to negative or overwhelm the Board's evidence. Therefore, it necessarily follows that the Board is not entitled to ignore the countervailing evidence in making its findings (*Indiana and Michigan case, supra*).

In *NLRB* v. *Laister-Kauffmann Aircraft Corp.*, (C. C. A. 8) 144 F. 2d 9, the court said:

> "It is undoubtedly true that a Board which with 'studied design' ignores all the evidence adduced by the employer and views as truthful only the testimony of adverse witnesses, acts arbitrarily and not in accord with legal requirements. *NLRB* v. *Sartorious Co.*, 2 Cir., 140 F. 2d 203, 205; *NLRB* v. *Union Pacific Stages, Inc.*, 9 Cir., 99 F. 2d 153, 177; *NLRB* v. *Greider Machine Tool & Die Co.*, 6 Cir., 142 F. 2d

163, 165, 'Testimony is the raw material out of which we construct truth and, unless all of it is weighed in its totality, errors will result and great injustices be wrought.' *NLRB* v. *Thompson Products, Inc.*, 6 Cir., 97 F. 2d 13, 15. And Section 10 (e) of the Act, 49 Stat. 453, 29 U. S. C. A., Sec. 160 (e), which provides that 'The findings of the Board as to the facts, if supported by evidence, shall be conclusive,' does not, of course compel the courts to accept findings reached by accepting evidence presented by one side to the controversy with total disregard for other worthy evidence before the Board. *NLRB* v. *Union Pacific Stages, supra.*"

If ever there was a case of "studied design" to ignore a company's evidence and find against it at all events, it is here.

No other conclusion can be reached in the case at bar, except that the Board has simply ignored petitioner's and intervener's testimony. To disregard evidence of a fact which 1,200 persons say is true, is equivalent to refusing to receive that evidence altogether.

Nor can the Board call this an isolated instance in which respondent's evidence has been ignored. It disregards the respondent's evidence throughout the decision. For example, although respondent at the first hearing, proved by all the witnesses which the Trial Examiner would let testify, and offered to make similar proof by its other employee witnesses (III, 760), that they attended a meeting of the employees on March 30th, at which money was collected to take care of Mr. Tyler's fee, *and there was no testimony to the contrary*, yet the Trial Examiner makes the amazing finding (which the Board dittos) that "there was no such meeting" (X, 3873, footnote 42).

Also, although the Board's witness, Rose Todd, and all respondent's and intervener's witnesses testified that

the meeting of March 18th and April 27th were not Loyalty League meetings, and that there was no connection between the Loyalty League and the DGWU, and *even though there was no direct testimony to the contrary,* the Trial Examiner wholly disregarded this evidence and finds that the March 18th and April 27th meetings were "Loyalty League" meetings (X, 3867, 3886).

The same is true concerning the testimony as to the "supervisory status" of Rose Todd and other employees—although all the respondent's witnesses testified to the non-supervisory nature of Miss Todd's duties and that they did not consider her as "representing the management," yet the Trial Examiner totally disregarded this evidence, and the testimony of Mrs. Reed, Mr. Baty and Mrs. Reeves, that Rose Todd had no supervisory position, and finds that her duties were of a supervisory nature, and that she was "acting for" the management (X, 3858). The Board likewise totally disregarded similar overwhelming testimony of respondent's witnesses that they did not regard the instructors and thread girls as supervisory employees (See record citations pp. 158, *infra*).

Likewise, the Board absolutely refused to credit Mrs. Reed's, Mrs. Reeves's and Mr. Baty's testimony (VII, 2121-2124; II, 425, IV, 1173; II, 450), corroborated by the general testimony of the employees (VIII, 2846, 2862, 2864), that in June, 1935, a change was made in the factory whereby all authority over the operators was taken away from the instructors and vested in Mr. Baty—and the Board makes the further extraordinary finding that even if such change was made, the operators had no notice of it although working for two years under Mr. Baty! (X, 3853.)

In fact, there is scarcely an item of testimony of any consequence introduced by respondent or intervenor

which the Trial Examiner and Board accept, irrespective of how meager or unreliable the opposing evidence is.

All of this shows a "studied design," both by the Trial Examiner and by the Board, to ignore respondent's evidence and convict respondent at all events.

Also, it is shown by the additional arbitrary findings made by the Trial Examiner and Board in the first hearing, many of which have been abandoned in the present decision, because of the vigorous attacks made upon them in our brief in the court below on the former appeal.

All of these findings, as well as many other adverse findings, are explainable in only one way—that the Trial Examiner and Board were determined to find respondent guilty at all events and to totally disregard respondent's evidence if necessary to achieve that result, and therefore clearly come within the holding of the court in the *Laister-Kauffmann case, supra*, and should be set aside.

(3) The Board may not "arbitrarily" make findings against a respondent (*Laister-Kauffmann case, supra*).

While the "weight" of the evidence is for the Board, yet the burden of proof is on the Board to prove its case by substantial evidence (*American Smelting & Ref. Co.* v. *NLRB*, (C. C. A. 8) 126 F. 2d 680, 686; *Interlake Iron Co.* v. *NLRB*, (C. C. A. 7) 131 F. 2d 129; *NLRB* v. *West Kentucky Coal Co.*, 152 F. 2d 198, 202); and to *fairly evaluate* the evidence.

If it is obvious that the Board has not proved its case (or a particular fact), by a fair preponderance of the evidence, but the Board, nevertheless, makes findings contrary to the overwhelming evidence, it shows that the Board has not fairly evaluated the evidence, and such findings can only be denominated as "arbitrary and capricious." That occurs so repeatedly in the case at bar as to leave no doubt that the Trial Examiner and Board have

made their findings with the "studied design" of convicting petitioner irrespective of the evidence.

We submit that the Trial Examiner's reasons given in footnote 33 (X, 3867) for his finding that the meeting of March 18th was held during working hours, show the arbitrary and capricious nature of the finding—especially so as he includes in the same category the organization meeting of April 27th, as to which the evidence is even more overwhelming that it was held after working hours.

The alleged reasons given in footnote 33 for the finding, show the utter lack of good faith of the Trial Examiner and Board. The Trial Examiner first says that the respondent's testimony is "contrary to the weight of the evidence"—(But can it be reasonably said that the Board's six witnesses outweigh 1,200?); he then refers to the "indefinite and routine" testimony of respondent's witnesses and to their "lack of knowledge of details"—(But how could their testimony be more "definite" than the positive statements of the witnesses that the meeting was held after working hours and usually specifying the hour as 4:30 or 5:00 o'clock? And how could such testimony be anything but "routine"? And how is testimony of the Board's witnesses that the meeting occurred at 2:00 or 3:00 o'clock, any less "indefinite" or any less "routine"? Also what "lack of knowledge of details" is involved in testifying as to whether a meeting occurred after working hours—it either did or it didn't). The Trial Examiner then says that the Board's witnesses were "mutually corroborative" —(But weren't the respondent's witnesses also mutually corroborative when they all testify that the meeting was after working hours?); then he says that the Board's testimony is supported by the testimony that "the operators attended the meetings in their uniforms"—(But this was

explained by the witnesses who said that some of the employees (who got off work early) would change to their street clothes before going to the meetings and others who got off later would attend in their uniforms and then go to their lockers and change to their street clothes, VIII, 2818, 2873).

And lastly, the Trial Examiner gives as a reason for finding that the meeting was during working hours, that "no definite time was given in the call for the meetings" (But obviously that is a reason for reaching the *opposite* conclusion—if the meeting was to be held during working hours *it would be necessary to fix a time*, otherwise the employees would not know when to leave their work to go to the meeting. but if the meeting was to be held "after work," that was all the designation necessary).

We respectfully submit that none of the reasons given in footnote 33 constitutes a valid reason for disregarding the overwhelming direct testimony of the 1,200 employees, that the March 18th and April 27th meetings were held after working hours, but that the reasons enumerated are so unconvincing as to show the "studied design" of the Trial Examiner and Board to ignore respondent's evidence, and this, and other similar findings, should not be permitted to stand (*Laister-Kauffmann Case, Supra*).

Real Purpcse of March 18th Meeting.

Why was the March 18th meeting called by the employees? It was at this time that the ILGWU and its agents were brutally assaulting with clubs and other deadly weapons girls and women employed at the Gernes, Gordon and Missouri garment plants located within a few blocks of respondent's plant. The ILGWU's agents were threatening to attack the Donnelly employees next, subject them to worse brutality (IV, 1225, 1228). The em-

ployees not only knew that they were liable at any moment to be pounced upon by strong-arm gangs of lawless racketeers but that their jobs would be lost if the plant was closed. They called a meeting to discuss these matters and during the meeting decided to call Mrs. Reed to see what the company would do to afford them protection (I, 144). Was there anything wrong about that? It was an appeal by these decent girls and women to their employer for help. Under the circumstances what was the moral if not the legal duty of the employer? Certainly it was to protect said employees in any way it reasonably could. In addition, an employer would have a direct interest to protect his employees in order to avoid the closing of his plant. Indeed under the old common law the employer had the right to defend his employee even to the point of death. If an employee comes to his employer and asks for protection against criminal assaults, is any court or any tribunal, outside of the Labor Board, ever going to say that the employer is guilty of a coercive act, when in response to such appeal he promises that he will do what he can to protect him?

The undisputed evidence shows that the *employees* asked Mrs. Reed to come to this meeting (I, 45) and tell them what the company would do to afford them protection. She made a few short remarks. We quote verbatim the portions thereof material to the issues herein:

> "I know you are thinking about the threats of violence that the Union is making against you and the company. I want to say that the Company and I intend to do everything possible to protect you in case of any violence. We are now trying to make arrangements with the street car company for its busses to go to certain points and pick you people up and bring you to the plant. We will let you know about this as soon as arrangements can be made.

"Many of you have been here for a number of years and you know that you have never been asked whether or not you belong to a union. The company has not discriminated against anyone on that account and Mr. Dubinsky is not going to make me discriminate against employees because they would not belong to his Union. If you want to belong that is your own business and it is up to you to decide. I will say that neither Dubinsky or any other buttinsky is going to intimidate me or the Company into forcing you to join the International Union against your will.

"I can't say at this time what will be done to protect you against violence, but the company's attorneys will consider what legal steps might be advisable. In any event, you can understand that the company will not submit to any unlawful attacks lying down" (III, 1030).

The Board accepts the stenographic record of Mrs. Reed's talk and holds that it constitutes coercion (X, 3868). But that the Board really recognizes the obvious natural meaning and interpretation of Mrs. Reed's remarks to be that the employees were free to exercise their rights as to union membership is shown by its statement (X, 3869) that "Mrs. Reed *sought to appear* as a disinterested defender of the respondent's employees in the exercise of their right to join or not join a labor organization." If the Trial Examiner and Board deem that Mrs. Reed, by her talk, was seeking to convey to the employees that they were free to join or not join a labor organization, is it not logical to conclude that the employees also got that impression from her talk?

The testimony of the employees shows that they did so understand Mrs. Reed's remarks (II, 554, 611, 640a; III, 758-9).

It will be noted that Mrs. Reed stated the company was trying to make arrangements for busses to bring the

employees to work. Busses were immediately thereafter arranged for and did bring the employees to and from work for a long period of time at the company's expense (VII, 2085). The Board charged in its original complaint that this was an act of unfair labor practice, then it amended its complaint omitting the charge with reference to the said busses, recognizing the absurdity of claiming that it was an unfair labor practice for respondent to give this protection to its employees. The only other protection that these employees have ever had was given by a United States Federal Court which enjoined the ILGWU from committing any acts of violence against respondent or its employees.

The Board from the innocent and commendatory remarks of Mrs. Reed draws the conclusion that they were coercive, demonstrating the complete bias and prejudice on the part of the Board against respondent. The Board attempts to support its conclusion by unwarranted inferences. For example, the Board states:

> "Mrs. Reed painted the ILGWU as the common enemy of both the respondent and its employees."

This is a plain distortion. Mrs. Reed did not say that the ILGWU was the "common enemy of both the respondent and its employees." This is a made up phrase of the Board. If, however, she had referred to them as a "common enemy" she would have said nothing which was not already within the knowledge of every employee. They knew that the ILGWU and Dubinsky proposed to assault their persons and destroy the business of respondent. She did not go into a discussion of what had happened at other plants, but merely said:

> "I want to say that the Company and I intend to do everything possible to protect you in case of any violence."

She simply assured these frightened women that the company would do what it could to protect them. She further said that *she* was not going to be forced by Mr. Dubinsky to force her employees to join a union against their will. She did not say anything even intimating that the employees should not join the ILGWU if they wanted to. Her statement was not an unfair or coercive statement. If the Trial Examiner had permitted respondent to show what was going on at other garment factories, it would have shown that other employers in the garment industry in Kansas City were being forced by the ILGWU to force their employees against their wills to join the ILGWU (*exactly contrary* to the NLR Act) and Mrs. Reed was merely telling her employees that *they* could do as they pleased and *she* was not going to be forced into forcing them to do anything they did not want to do. Instead of constituting "coercion" this was letting them know that they could do as they pleased about a union. She made it plain that "if you want to belong that is your own business and it is up to you to decide." And she also made it plain that the company had never discriminated against anyone because of their union membership and that it would not do so now. What plainer statement could be made of a neutral attitude as to unionism? Mrs. Reed's remarks can only fairly be interpreted to mean that she was going to comply with the letter and spirit of the law and that the ILGWU and Dubinsky were not going to make *her* violate the law. We submit that Mrs. Reed's remarks were not coercive and therefore did not constitute any violation of the Act.

There was no mention made of a "plant" union by Mrs. Reed, or anyone else at the March 18th meeting.

In fact, no thought of a plant union occurred until after April 12th (I, 64; II, 577).

However, the preference of Mrs. Reed—or respondent, for one union or another, or for no union, does not con-

stitute an unfair labor practice, unless such preference is made *coercive* (which was not the case here).

Texas & N. O. R. R. Co. v. *Brotherhood of Ry. and S. S. Clerks*, 281 U. S. 548, 568.

Midland Steel Products Co. v. *NLRB*, (C. C. A. 6) 113 F. 2d 800, l. c. 804:

"The finding of the Board that the comment of the *general superintendent* that the men in petitioner's Detroit plant were 'disgusted with unionism' constituted evidence of interference, restraint and coercion, raises the question whether any and all statements derogatory to unions are prohibited by the Act. It is not claimed that the comment was coupled with any threat of discrimination or loss of employment. It did not interfere with or restrain attempts to organize, nor did it attempt to do so. The comment may have been either a statement of fact or an expression of opinion, or a statement embodying both elements. * * * The use of influence amounting to interference, restraint or coercion plainly is illegal. Cf. *Texas & New Orleans Rd. Co.* v. *Brotherhood of Railway & Steamship Clerks, supra.* But *where no such element exists* the employer is not precluded from conversing with employees about *labor* questions."

L. Greif & Bro. v. *NLRB*, (C. C. A. 4) 108 F. 2d 551 (l .c. 557-8):

"The real query is whether the management has interfered or taken part in the formation of the new body. It is not an answer to point to circumstances indicating that the management *preferred an inside to an outside union*, or that citizens in the community entertained a hostile feeling toward the Amalgamated It goes without saying that the determination of the employees to form their own association and to be free from the outside interference of a national union was influenced by their past experience in the plant, and

by the general opinion in the community of which they are a part; but these contracts did not deprive them of their rights under the Act, or require them to choose bargaining representatives offensive to their employer or to their fellow citizens, so long as their choice was not dominated or interfered with by the employer."

As was said in *Humble Oil & Refining Co. case, supra*, l. c. 88:

"If employer interference has been slight, and *not coercive or oppressive*, suppression of a major organization whose members are not complaining of interference would be an *extreme step*."

Mrs. Reed's talk contained nothing coercive, and was not in a setting of coerciveness, hence it does not support the Board's findings, under either of the Virginia Electric cases by this court (*NLRB* v. *Virginia Elec. & P. Co.*, 314 U. S. 469; *Virginia Elec. & P. Co.* v. *NLRB*, 319 U. S. 533), and her remarks were clearly within the constitutional right of free speech, under the rulings in both of those cases, and in many recent decisions by the Circuit Courts of Appeals (*NLRB* v. *American Tube Bending Co.*, (C. C. A. 2) 134 F. 2d 993; *Budd Mfg. Co.* v. *NLRB*, (C. C. A. 3) 142 F. 2d 922; *Jacksonville Paper Co.* v. *NLRB*, (C. C. A. 5) 137 F. 2d 148; *NLRB* v. *Brandeis & Sons*, (C. C. A. 8) 145 F. 2d 556, l. c. 564, and cases there cited.

Other Findings of the Board Re March 18th Meeting.

The Board finds that the meeting was sponsored by the respondent, and that its instructors notified the operators that "they were to attend" the meeting (X, 3867).

Respondent's witnesses who testified, and the 1100-odd employees whose testimony was refused by the Trial Examiner as cumulative, testify to the contrary.

"Q. State whether or not that meeting, so far as you know, was called by the employees on their own initative.

A. As far as I know, it was.

Q. Do you know of any action, influence or suggestion of the employer or of any representative of the employer in connection with the calling of that meeting?

A. I don't know of any" (Lois Barnes, VIII, 2815).

To the same general effect:

Hazel Saucke, VIII, 2627-8; Lois Barnes, 2774; Edith Dean, 2851; Jessie Mudd, 2921; Ethel Riegel, IX, 3007; Lydia Phillips, 3081; Louise Garrett, 3124-5; Alice Freed, 3189.

"Q. Did any instructor suggest or direct that you attend any of these meetings?

A. No" (Alice Freed, IX, 3195).

To the same effect:

Hazel Saucke, VIII, 2643; Lois Barnes 2779; Edith Dean, 2873; Jessie Mudd, 2917; Oma Lee Cooper, 2571-2; Ruby Clayton, IX, 3046; Lydia Phillips, 3078; Louise Garrett, 3122; Ethel Riegel, 3020.

The Board makes the finding that "most all the supervisory force" were in attendance at the March 18th meeting (X, 3867). By this the Trial Examiner probably refers to the instructors, thread girls, Rose Todd and the other individuals which he finds to be supervisory employees, but which respondent contends were not supervisory employees. The Trial Examiner names only two employees entitled to be classified as supervisory—Mrs. Hyde and Mrs. Reeves. But Mrs. Reeves was in New York at the time of this meeting and obviously was not

present (II, 404), and Mrs. Hyde's testimony shows that she only learned of the meeting by chance and arrived only for the last part of the meeting (II, 535). Obviously, her casual presence under these circumstances cannot characterize the meeting as one "sponsored" by the company.

The Board also finds that the March 18th meeting was sponsored by the Loyalty League (X, 3868). There is not a scintilla of testimony that this was a meeting of the Loyalty League. In fact, one of the Board's principal witnesses, Elsa Graham Greenhaw, testified that she was *not* a member of the Loyalty League, but that she *had* attended this meeting and that it was a meeting of *employees* (I, 354a, 365).

Had it been a Loyalty League meeting or had she thought it was, she certainly would have so testified for her testimony shows that she had a personal grudge against the Donnelly Company.

Nor did the Board's other principal witness at the first trial, May Fike, *nor any of the Board's witnesses at the second hearing*, say that it was a Loyalty League meeting.

On the other hand, all of respondent's and intervener's witnesses testified positively that it was *not* a Loyalty League meeting (see record citations p. 192, *infra*).

But this overwhelming proof means nothing to this Trial Examiner and the Board—they find it to be a Loyalty League meeting anyway.

We respectfully submit that the Board's findings and conclusions with reference to the March 18th meeting and as to Mrs. Reed's remarks, are unsupported by the evidence, are contrary to the law, and should be set aside.

The Board's Argument.

The Board opens its argument on this point (p. 44) with a clear misstatement, to wit, that "Mrs. Reed *had* the letter read to a mass meeting of all the employees on March 18th," and again on page 45 that she "*brought* the letter from the ILGWU with her."

Not one of the record references given supports either of these statements (except, of course, the Trial Examiner's findings). At I, 48-49 the witness Rose Todd says she "thinks that there *was* a letter read" but she says she "don't remember Mrs. Reed reading anything" or that Mrs. Reed had it read. At I, 147-148, although the Board's counsel tries to put the answer into the witness' mouth that Mrs. Reed read the letter, the witness merely says "That is the meeting when the letter was read." At I, 310, the Board's own hostile witness, May Fike, says "Mrs. Reed read the letter," but immediately follows this by saying "She cried over the letter, and was grateful for the loyalty of the girls for standing by her," clearly showing that May Fike was referring to the "March 2d statement," not the March 9th letter. At I, 354b-354c, the Board's other hostile witness, Elsa Graham Greenhaw, does *not* say that Mrs. Reed "had" the letter read, but in fact is very hazy about the whole matter. At II, 588, there is nothing said about the letter; and at VIII, 2620, the witness says "Mrs. Reed *didn't* read the letter" but that "one of the girls read part of one of the pamphlets that the girls had handed her out in front of the building" (meaning pamphlets distributed by the ILGWU).

The Board's attempt to charge Mrs. Reed with introducing this letter into the March 18th meeting is wholly unwarranted. The undisputed evidence is that the ILGWU, just prior to the March 18th meeting, had dis-

tributed to the Donnelly employees in front of the building a pamphlet containing a copy of the March 9th letter (VIII, 2725). Therefore, it was not a matter of Mrs. Reed having the only copy of the letter and being the only one who could bring it to the meeting—the ILGWU wanted the Donnelly company employees to see this letter and the employees had many copies of it (VIII, 2725). A copy of the pamphlet was introduced in evidence (VIII, 2726) and appears at XI, 4181-83. The Board's contention that Mrs. Reed brought the letter to the meeting, or had it read at the meeting, is not only not supported by the evidence but is wholly misleading.

At none of these places is there any statement that Mrs. Reed *brought* the letter to the meeting or that she *had* it read.

The Board does not cite reference to Mrs. Reed's testimony on this subject (VII, 2089) where she says positively that she did not read the letter and that it was not read in her presence and that she heard or knew nothing about it.

We submit that this finding is a typical example of the farfetched findings on which the Board's order is based.

At page 45 the Board says, "The meeting was attended by most of the Company's supervisory force." This is either a complete misstatement or is based on the "assumption" that Rose Todd, Hobart Atherton, the instructors, thread girls, etc., are supervisory employees, Respondent contending that they are *not*. None of the management was at the meeting, except that Mrs. Hyde testified that she only learned of the meeting by chance and arrived only for the last part of it (II, 535). Her presence "on this record was innocuous," as said in *NLRB* v. *Clinton Woolen Mfg. Co.*, 141 F. 2d l. c. 757.

At I, 309-310, May Fike testifies that Mrs. Reeves was there and she *thinks* Mr. Baty was. Mrs. Reeves was

in New York at the time (II, 404) (which shows, incidentally, the looseness with which May Fike testified—even the Trial Examiner finding her testimony not credible as to another matter X, 3891). Mr. Baty testified he was not at the meeting (II, 442a).

The rest of the Board's argument in regard to the March 18th meeting has been fully answered above and we do not here repeat except to call attention again that the Board bases its findings on the testimony of three or four witnesses, against 1,200, which to our minds is not "substantial" evidence "from which the fact in issue can be *reasonably* inferred" (*Washington, Va. & Md. Coach Co.* v. *NLRB*, 301 U. S. 142) or such evidence "as a *reasonable* mind might accept as adequate to support a conclusion" (*Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 229).

B-2.

The Board's Findings and Conclusions As to "Supervisory" Employees Are Not Supported by the Evidence.

The Board finds that the following employees were supervisory employees (X, 3850-59):

Rose Todd	Mrs. Gray
Hobart Atherton	Mrs. Strickland
Mrs. Tyhurst	Ortense Root
Marvin Price	Heath Cowan
Ted Scoles	The Instructors
Mrs. Bogart	The Thread Girls

Primarily, it finds Rose Todd, Hobart Atherton, the instructors and thread girls to be supervisory employees (X, 3850-3859). Upon its findings that these were "supervisory" employees, the Board bases many of its findings against respondent. We submit that the Board's

findings and conclusions with respect to these employees are contrary to the evidence and to the law.

Before discussing the status of the individual employees whom the Board finds were "supervisory" employees and were "representing the management," we desire to discuss briefly the general subject of supervisory employees and the rules applicable thereto in cases of this kind.

(1) Re Supervisory Employees Generally.

There is not a scintilla of evidence that any one of the above mentioned employees possessed any authority to hire, discipline or discharge other employees or occupied any position with authority to give orders to other employees. Nor is there any evidence that any of the said employees were held out by petitioner as possessing authority to speak for the management with respect to labor union activities. Nor is there any substantial evidence that the employees thought, or had reason to believe, that any of the aforesaid employees were acting for the management in what they said or did with respect to the formation of the DGWU or other labor union matters, but the evidence is overwhelming to the contrary.

CASE AT BAR IS NOT WITHIN THE HOLDINGS OF THE INTERNATIONAL MACHINISTS AND SIMILAR CASES.

We wish to meet head-on the contention that these employees and their activities bring them within the holdings in the cases of *International Association et al.* v. *NLRB*, 311 U. S. 72; *H. J. Heinz Co.* v. *NLRB*, 311 U. S. 514; *NLRB* v. *Link-Belt Co.*, 311 U. S. 584, which cases appear to be the ones primarily relied upon by the Board.

In the *International Machinists* case, the fact situation is vastly different from that in the case at bar. We

quote rather fully from the Court's opinion in that case, which clearly shows that the court was dealing with a situation wholly different from the fact situation here. The court said (l. c. 76-77):

> "The *general manager* told Shock that he would close the plant rather than deal with UAW. The *superintendent* and Shock reported to toolroom employees that the employer would not recognize the CIO. The superintendent let it be known that the employer would deal with an A. F. of L. union. At the same time the superintendent also stated to one of the employees that some of the 'foremen don't like the CIO' and added, with prophetic vision, that there was going to be quite a layoff around here and these fellows that don't like the CIO are going to lay those fellows off first.' * * *
>
> "Byroad spent considerable time during working hours soliciting employees, threatening loss of employment to those who did not sign up with petitioner and representing that he was acting in line with the desires of the toolroom foreman, McCoy. This active solicitation for petitioner was on company time and was made openly in the shop. Much of it was made in the presence of the toolroom *foreman, McCoy, who clearly knew what was being done.* * * *
>
> "Five UAW officials had been discharged in June, 1937, because of their union activities."

A brief review of these facts will show the great differences existing between the *International Machinists* case and the Donnelly case:

(a) In the International case there was direct coercive acts by high company officials (the general manager, superintendent, foreman) in favor of one union and against another. This evidence amply justified the Court's holding that the employer assisted petitioner in the International case in enrolling a majority of the employees.

But there is no such evidence in the case at bar. Here there is no evidence or finding by the Board of any such participation by Mr. Baty, production manager, or by Mrs. Reeves, merchandise manager, or by Mr. Keyes, sales manager, or by Mrs. Reed, president, who were the principal officials in touch with the employees in the Donnelly plant. (May Fike and Elsa Lou Greenhaw did testify that Mrs. Reed in a talk to the employees on March 18th, stated that she would close her factory before she would permit it to be unionized, but this testimony was contradicted by the stenographic copy of Mrs. Reed's talk and by all of respondent's witnesses, and was evidently so unworthy of belief that the Board states that it "does not consider it necessary to resolve the conflict in this testimony" (X, 3868), and makes no finding that Mrs. Reed made any such statement.) We respectfully submit that there is no showing in the Donnelly case of direct coercion such as is shown in the International case.

(b) In the International case "five UAW officials had been discharged in June, 1937, because of their union activities" (p. 77).

In the Donnelly case the Board found no discharges for union activities, although there were over 1,200 employees. The most that the Board and ILGWU could do in this regard was to charge that the company had discriminated against May Fike and Sylvia Hull and refused to reinstate them because of their affiliations with the ILGWU. However, the testimony of May Fike was so unworthy of belief that the Trial Examiner in his Intermediate Report states, "the undersigned does not credit this testimony of Fike" (X, 3891), and found that she was not discharged because of her affiliations with the ILGWU or denied reinstatement for that reason. The Trial Examiner did find that Sylvia Hull "was temporarily laid

off by the respondent because of her membership in and activities on behalf of the ILGWU" (X, 3890) (which finding we show in Point B-11 was unjustified) but found that she was not entitled to reinstatement or any reimbursement for loss of pay. Out of the large turnover which occurs among 1,200 employees, the Board, assisted by the ILGWU's far-reaching acquaintance among employees in the garment industry, was able to find no discriminatory discharges of employees by respondent over a period of seven years, from 1935, to the date of the second trial in 1942 (The complaint originally charged discrimination against some 18 employees back in 1934-5, but these charges were dismissed or abandoned, A. 423, 506).

Obviously this situation is not comparable to the situation in the International Machinists case.

(c) In the International Machinists case, "on August 10, 1937, the UAW *having a clear majority* of all the employees, presented to the employer a proposed written contract for collective bargaining. *This was refused*" (l. c. 77). On August 11, 1937, *the next day*, the company signed a closed shop contract with petitioner.

How different from the Donnelly situation! Here the DGWU having not merely a "clear majority" but an "Ivory Soap" 99 44/100% majority of the employees, sought a collective bargaining contract with petitioner on April 28th—and partial contract was not made until May 27th, and supplemental contract as to wages was not made until June 22nd (III. 807, 812).

(d) In the Donnelly case there was no "acquiescence in the drive for membership and close surveillance of the competitor" (as in the *Machinists case*, l. c. 78), as the DGWU was formed at one meeting and there was no drive by any competitive union.

In the Donnelly case the DGWU members were not closely identified with a company-dominated union, until "their quick shift" to petitioner, as in the *International case* (l. c. 79), as there was no predecessor union in the Donnelly plant. The Board, faced with the necessity of overcoming that fact, seeks to substitute as a "predecessor union" a social organization among the employees known as the Loyalty League, but all the employees testified that the Loyalty League was purely a social organization and performed none of the functions of a labor union, and that it had no connection whatever with the DGWU, but was wholly distinct and separate therefrom. This is discussed more fully under Point B-3 of this brief.

In the Donnelly case there was no "ready acceptance of the DGWU contract and *contemporaneous rejection* of contract tendered by competitive union" as in the *International case* (l. c. 79), as we have just pointed out under (c) above.

The Board here charges "hostility" by respondent toward the ILGWU, but such hostility, if any, as respondent had toward the ILGWU, *was not manifested in any interference with or opposition to the employees' choice of a labor union*, but was confined to court litigation in which respondent sought to save its business from unlawful attacks by the ILGWU. Surely, a company has a right to defend the very existence of its business in the courts against a labor union, which is conducting an unlawful attack against such company, without such action by the company being held, *ipso facto*, to constitute coercion of its employees under the NLR Act. Yet that is what the Board's findings as to hostility amount to. There is no substantial testimony that the company discriminated against its employees because of their affiliations with the ILGWU. The amended complaint charged such discrimination against 18 named employees (alleged to have occurred

away back in 1934-35, A, 423), but the charges as to all of these persons were either dismissed by the Board or Trial Examiner (A, 506). The sole finding of discrimination is as to Sylvia Hull (and even as to her, the Board finds that after leaving petitioner's employ, she never sought to come back, that respondent in good faith sought to call her back and that she was not entitled to any "loss of pay" or reinstatement, X, 3889-90). Surely, this state of the record falls far short of showing discrimination or any hostility affecting the rights of employees to join the ILGWU or any union they might want to join. In contradistinction, in the *International* case, the hostility of the employer was directly used *in the union drive for membership*—the company, in the words of the Court, "evincing great hostility to the UAW *in a contest to enlist* its production force" (l. c. 75).

In our limited space we shall not attempt to point out further differences between the International Machinist case and the Donnelly case—obviously, the two pictures are entirely different and the holding in the International case is *not authority* for a similar holding here.

In *H. J. Heinz Co. v. NLRB, supra,* the facts and circumstances were also quite different from those in the Donnelly case, as disclosed by the following quotation from the court's opinion (l. c. 517, 518, 519):

> "The Board found that during April and May, 1937, the *two rival* labor organizations, the Association and the Union, sought to organize petitioner's employees at its Pittsburgh plant. * * *
>
> "*Petitioner does not deny* that there is evidence supporting the findings that *petitioner's superintendent,* during the organization campaign, upbraided employees for attending Union meetings, threatened one with discharge if he joined the Union, spoke to them disparagingly of the Union and directed some of peti-

tioner's foremen to enroll the employees in the Association; or that there was evidence supporting the finding that a *general foreman* working throughout petitioner's Pittsburgh plant was active in disparaging the Union and its members to employees, and in urging them to repudiate the Union organization, or that *three other foremen* in charge of particular buildings or departments were *active in dissuading employees from joining the Union.* All three spoke disparagingly of the Union, one at a meeting of employees which he had called; and two were active in questioning employees concerning their labor union sympathies. Two of them threatened employees with discharge or loss of work or privileges if the Union were recognized.

"There was also evidence that *other foremen or forewomen* in charge of large groups of employees engaged in similar activities; * * *

"Petitioner does not seriously dispute this evidence or challenge the findings of the Board summarizing it."

We will not attempt to point out in detail the great differences between the Heinz case and the Donnelly case, as we did in the *International Machinists case, supra*, but such differences are very apparent. For example, in the Heinz case there were two rival labor organizations conducting an active drive for members among the employees; this was not the case in the Donnelly plant. Also, from the quotation it appears beyond question (and was not even questioned by the Heinz Co.) that high officials of the company (the superintendent, general foreman, and other foremen and forewomen) actively participated *in the organization* of the Association, which is far different from the situation in the Donnelly case.

In *NLRB* v. *Link-Belt Co., supra,* the fact situation was also far different from that in the Donnelly case. In describing the conditions, the Court said (l. c. 586-598):

"From 1933 down to that date the employer, Link-Belt Co., had *maintained a company union*, apparently continuing to recognize it even after passage of the Act in 1935 and even though under the Act it was concededly an improper bargaining unit. In any event, that union remained in existence *until Independent's membership drive was successfully concluded.* * * *

"In September, 1936, Salmons, an employee of 14 years' standing, who was an employee representative in the company union and who became dissatisfied with it, initiated the formation of Amalgamated, an 'outside' organization. Amalgamated held its first organizing meeting on September 20, 1936. Salmons was discharged the next day by plant manager Berry for 'spreading union propaganda around here.' * * *

"On September 21, 1936, another employee, Novak, who had been employed by the company for over 11 years, was also discharged without warning by Berry, who believed, mistakenly it would seem, that Novak was a member of and solicitor for Amalgamated. Berry gave him half an hour to get out, after charging him with being 'an organizer and instigator for a union'—a charge which Novak denied. * * *

"Beyond that is the active support of Independent by some of the supervisory staff. There is abundant testimony that Siskauskis, *a foreman, actively solicited* for Independent. * * *

"There was considerable testimony, not denied, that Belov, *a night boss*, also solicited for Independent. According to one employee, Kalamarie, Belov did so *on written instructions left by foreman* McKinney which Kalamarie read. Kalamarie testified as follows respecting this conversation with Belov about those instructions: * * *

"Thomas, an employee, testified that his boss, Big Louie, 'a kind of *assistant foreman*' solicited for Independent getting about ten signatures; that Big Louie told him that 'they were trying to get the CIO out of there.'" * * *

From the foregoing quotation, the differences between the Link-Belt Co. case and the Donnelly case are apparent and we will not take time to point them out in detail. In the first place, there was a "company union" in the Link-Belt case, *maintained by the company down to the time of the organization of the plant union,* whereas, there was no previous union at the Donnelly plant. Also, in the Link-Belt case, employees (Salmons and Novak) were clearly discharged for activities on behalf of the outside union; *foremen* of the company, themselves, actively solicited and signed up members for the independent union; also, Olson, an *assistant superintendent,* told an employee that the employees would be better off if they formed their own union and "kept the outside union out."

This shows a decidedly different situation from that existing in the case at bar.

The court in the *Link-Belt case* held as follows (l. c. 588):

> "It would indeed be a rare case where the finders of fact would probe the precise factors of motivation which underlay each employee's choice. Normally, the conclusion that their choice was restrained by the employer's interference *must of necessity be based* on the existence of conditions or circumstances *which the employer created or for which he was fairly responsible* and *as a result of which it may reasonably be inferred* that the employees did not have that complete and unfettered freedom of choice which the Act contemplates."

We respectfully urge that the conditions and circumstances in the Donnelly case upon which the Board relies, were not conditions which the "employer created or for which he was fairly responsible," nor were they conditions "as a result of which it may be reasonably inferred" that the employees did not have the full freedom of choice

which the act contemplates. In the Donnelly case, as distinguished from the Link-Belt case, there was an opportunity to "probe the precise factors of motivation which underlay the employees' choice." The respondent and intervener DGWU desired and offered to put on the witness stand virtually 100% of the employees concerned and obtain their own sworn testimony as to what factors motivated them in forming the DGWU (Ex. 1-OOOO, III, 743 *et seq.*; 1-RRRR, III, 764; 1-VVVVV, X, 3792-3; X, 3829-34; IX, 3290). All the employees whom the Trial Examiner permitted respondent or intervener DGWU to call as witnesses testified that the employees in forming the DGWU were motivated by their own desires and not by any coercion or interference on the part of respondent; and while the testimony of comparatively few employees was permitted to be given, yet we believe the fair and correct rule is that when a court or Trial Examiner stops the putting on of further witnesses on the ground that their testimony is cumulative, then the court or Trial Examiner, in determining the case, should assume that the testimony of all additional witnesses whose testimony is offered, will be substantially to the same effect as that given by the witnesses who were permitted to testify, concerning the subjects as to which they testified, as Judge Riddick held (XIII, 53). This is especially true here as there were offered in evidence the sworn statements (affidavits) of all the members of the DGWU (some 1,195), to the effect that the DGWU was their free choice (Intervener's Exhibit 20A to 20KK, VI, 1675), and the court does not have to rely on the offers of proof alone in concluding that the employees really felt that way about the matter. This means that, in the case at bar, the court *does have* "the precise factors of motivation which underlay each employee's choice." And those factors were that the employees wanted their own union and not an outside union

(ILGWU), whose methods they knew were violent, whose dues were high, and whose headquarters were far away (II, 657-8; VIII, 2566, 3006).

The testimony of the employees themselves, shows most positively that the employees whom the Board finds to be "supervisory" employees, and to be "representatives of the management," *were not considered as such by the employees* (see record citations, pp. 158, 170-171, 176, *infra*); and that is the best proof that there was no coercion by the alleged supervisory employees, and is proof that under the test laid down in the International Machinist case, the findings of the Board as to domination of the employees through supervisory employees, are not supported by the evidence.

(2) The Instructors and Thread Girls Were Not "Supervisory" Employees.

The Trial Examiner finds the instructors and thread girls to be supervisory employees.

The evidence shows that in the set-up of the Donnelly factory, the work of the instructors and thread girls is as follows:

The factory operates in sections of up to 40 operators, different classes of work being done in different sections. Assigned to each section is an instructor and usually a thread girl. The prime duty of the instructor is to show the operators how to do the various sewing operations and to assist in keeping them supplied with sewing bundles (II, 391, 450-1; VII, 2120-1; 2123-4). Such other duties as she performs are incidental. She has nothing to do with the hiring, firing or disciplining of operators, or with their coming to work or any general control of them —she is not "over" them in any way. The factory has six lines of dresses each year—first spring, second spring,

first summer, mid-summer, first fall and second fall (II, 390h). In each line, there are numerous different styles of dresses requiring many new or different sewing operations. The merchandise office furnishes written instructions on how to make the garments, but obviously operators would often have difficulty in following these instructions. The instructors show the operators how to perform these operations so that the dresses are made according to the plans (II, 391-2). This work requires constant aid and assistance to the operators on the numerous new styles in each of the six lines yearly. It is by that work that the status of an instructor is to be judged and we submit that neither her work nor position is such as puts her into the class of supervisory employees who represent the management in the sense used in labor cases but, on the contrary, shows that the instructors are employees entitled to the benefits of the National Labor Relations Act.

Analogously, there are inspectors in the Donnelly Plant who inspect the completed garments, and if they are not properly made send them back to the operators for correction (II, 392); but that does not mean that the inspector is "over" the operator, or "over" the instructor in the section where the garment was made; it merely means that the inspector has a certain type of work to do *which has a relationship* to the work of other persons in the plant. The management (*not* the instructors) has divided the work of making a dress up among different classes of workmen—designers, cutters, instructors, operators, inspectors, thread girls, etc. (II, 391). Each has a particular task to perform which has a relationship to the work of the others, but neither is a supervisory employee over the other, although one type of work may call for a higher degree of qualification and consequently for higher pay than the others.

The Trial Examiner holds Mr. Baty's testimony "incredible," that Mrs. Reed, in 1935, had taken away all supervisory authority from the instructors and given him complete supervision of the factory employees (X, 3851), although Mrs. Reed and Mrs. Reeves testified to the same effect, and this was corroborated by the testimony and offered testimony of the "1200 employees."

WORK OF OPERATORS IS PLANNED IN THE OFFICE.

The exercise by Mr. Baty of entire authority over the factory is not such an extraordinary or incredible task as the Trial Examiner seems to think. To understand the relationship between Mr. Baty and operators, it is necessary to know how carefully and completely the work of the factory is planned in the office. This is described by Mrs. Reeves (II, 390G-392). Complete patterns and written instructions are prepared showing how to make each style of dress. These instructions are furnished to the operators who work on the various styles; the bundles of dresses to be sewed are brought to the sewing sections by bundle boys and supplied to the operators by the thread girls and instructors, and the completed work is carried away. Except for showing the operators how to perform operations on new styles and handing them bundles of dresses to work on, there is practically no need for contact between the instructors and operators, nor between Mr. Baty and operators. The operators are anxious to do as much work as they can as their pay is on a piece work basis and they are desirous of doing it properly so that it will not come back to them for repair. Such complaints as do arise, such as adjustment of piece work prices, are readily handled by Mr. Baty, as he devotes his entire time to the factory, and he has a full-time assistant, Mrs. Hyde.

The Board's witness, Mrs. Skeens, testified (IX, 3453-4):

"Q. Wasn't work planned in the office upstairs?

A. Well, I think it was planned there, yes, what each section would do.

Q. Do you want to tell the Examiner that you had the authority to give out the work to certain people and refused to give work to other people?

A. Well, I didn't do anything like that.

Q. Well, you never thought that you had any right to do anything like that?

A. *Well, no, I wouldn't think so.* * * *

Q. Well, prior—now, I am speaking of prior to July, 1939—did you transfer operators out of your section without consulting Mr. Baty?

A. Why, I never did transfer any out unless somebody came and told me to transfer them out.

Q. Yes, and wasn't it Mr. Baty that did that?

A. No, it wasn't Mr. Baty.

Q. Wouldn't it come from Mr. Baty, the instructions.

A. Well, I imagine it would come from him but that wouldn't be the way I would receive it."

There you have an instructor (the Board's own witness) testifying that the instructors do not even have authority to give work to some operators and refuse it to others, or to transfer operators—(much less any authority to hire, fire, promote, demote or discipline). Mrs. Skeens also testified she never told an operator to join or not to join the DGWU (IX, 3460).

We respectfully submit that the mere fact that the Trial Examiner doesn't think the Donnelly set-up was a good one, doesn't support a finding that it didn't exist. Mrs. Reed testified (VII, 2122 —"whether it was a wise

thing or the right thing, I did give him the whole authority * * *."

The instructor has no authority to hire, fire, or discipline operators, nor any general control over the operators (Mrs. Reeves, II, 411-12; Mr. Baty, II, 450-1, VII, 2120-2124). All of the employee witnesses whom respondent was permitted to call so testified; and as the Trial Examiner held further testimony would be cumulative, it should be assumed that the remainder of the 1,200 witnesses would have testified likewise. If the operator does not want to come to work, she is not responsible to the instructor or thread girl, nor is the instructor or thread girl responsible to her. That responsibility belongs to the office. If an operators fails to show up for work, it is no concern to the instructor. Her job is to instruct the operators whom the office provides. Mr. Baty testified: "* * * it was none of their concern how the girls performed" (See balance of quotation II, 450-1).

An instructor may tell an operator "how" to sew an operation—but that doesn't make the instructor a supervisor in the sense of being a "foreman" or "overseer." (A traffic clerk may tell other employees how to ship certain goods, but that doesn't make the traffic clerk an overseer over the shipping department or over the vice-president in charge of sales.) The Board makes the following findings as to the duties of instructors and thread girls (X, 3850-1):

> "Among the duties of the instructor and thread girl in each section is the distribution of materials and supplies with which the operators work. Instructors also distribute directions as to how the work is to be done and teach operators how to execute each step of the process. This much is undisputed. * * *

"Among the duties of the instructor is the assignment of bundles containing the materials and supplies upon which the operators work, and the transmission to the operators of the respondent's instructions for the performance of the sewing processes."

This statement of the instructors' duties, instead of showing that the instructors are supervisory employees, shows the contrary.

We have discussed the instructors' duties with regard to showing the operator "how" to perform their sewing operations. Naturally, the operators must have some work to sew. This is brought to the sections, in bundles, by the bundle boys. Most of the operators perform one or two particular operations (thereby becoming more skilled and able to make more money on the piece work basis). When the bundles come in, they are handed to the various operators who are doing the particular types of operations in those bundles (II, 392). The instructor sometimes performs this manual task of handing (the Board calls it "assigning") the bundles to the operators concerned. Or it may be done by the thread girl (I, 299, 300). Or the operator herself may get up and get a bundle if she runs out of work—but the system installed by respondent contemplates making things as easy as possible for the operator, thus enabling her to earn more money, and it is for that reason that the bundle boys bring the bundles to the sections and the instructors and thread girls supply them to the operators as needed. None of this work is supervisory in the sense that the instructor or thread girl is "over" the operator. These duties of the thread girls most obviously do not put them any where near the class of supervisory employees.

In the first Intermediate Report, and in the first decision of the Board, the Trial Examiner and Board *did not*

find the thread girls to be supervisory employees. The finding now that they are is an example of the lengths to which the Trial Examiner and Board are willing to go to make a finding against respondent.

The Board's witness, May Fike, testified regarding thread girls (I, 299):

> "A. They carry your work to you and take it away and bring your thread and your binding, keep you supplied, and answer the telephone when the instructor is busy."

That certainly is not a description of "supervisory" work.

Asked if an instructor does any work, May Fike testified (p. 300): "Only when she is instructing some girl," and when not instructing, "she usually examines work part of the time." That certainly is not "supervisory."

Endeavoring to show that instructors had authority over thread girls, the Board asked Mrs. Fike (p. 300) if instructors told thread girls to bring work to the operators; but May Fike answered:

> "A. She would tell her to bring us a certain number of work, if we should be changing work. If we wasn't changing work, she would just tell her to bring us work, if we didn't tell her. *We sometimes told the thread girl ourselves.*"

According to the Board's method of drawing inferences, that would mean that the operators were supervisors over the thread girls because they sometimes "told" the thread girls to bring them work! But we respectfully insist that the complete answer to this matter is that the respondent, through Mr. Baty in 1935, had set up a certain system, dividing the work among operators, instructors,

thread girls, inspectors, bundle boys, etc., and the mere fact that an operator told a thread girl to bring her work, or an instructor told an operator "this seam should be sewn this way," or a thread girl told an instructor to answer the phone, or an operator told Mr. Baty or the mechanical department that her machine must be fixed, or an inspector sent a garment back to an operator "to be repaired," or Mrs. Tyhurst told the cutters or pattern makers to "put another notch" in the pattern, doesn't mean that the operators are over the thread girls, or the thread girls over the instructors, or the instructors over the operators or thread girls, or the inspectors over the operators, or Mrs. Tyhurst over the cutting or pattern department, or the operators over Mr. Baty or the mechanical department. It merely means that *each employee is carrying out his own part of the work in accordance with the plan laid out by Mr. Baty.* None of them could "enforce" their "orders" or requests except through Mr. Baty, and the testimony of the employees, generally, shows that they did not regard the instructors, thread girls, inspectors, Mrs. Tyhurst, *et al.*, as "over" them, but as working *with* them, all under Mr. Baty.

"Conclusionary" Findings of Board.

The Trial Examiner makes a number of "conclusionary" findings regarding minor and incidental duties of instructors.

For example, the Board finds that the instructors "keep the operators busy" (X, 3852), evidently intending thereby to imply that the instructors had authority to *make* the girls keep busy. Mrs. Reeves testified that instructors "keep the operators in plenty of work" (II, 411). This testimony referred to keeping the operators *supplied with material*; it did not refer to *discipline* of

the operators by the instructors or mean that the instructors have authority to or did *compel* operators to "*get* busy" or "*keep* busy." Obviously this finding is a warping of the testimony, and the testimony does not support the "hidden meaning" which the Board places thereon (*NLRB* v. *International Shoe Co., supra*).

The Board quotes an isolated sentence from an affidavit (the affidavit not being in evidence) by Mrs. Reeves that "competent instructors teach the operators the particular operations to be performed by them, *and constantly supervise the same,*" from which the Board apparently deduces that the instructors are supervisors over the operators. This is a warped construction of the language used in the affidavit. The words "constantly supervise the same" refer to the *work* of the operators, not to *disciplining* the operators. After an instructor has told an operator how to do an operation she doesn't sit idly by and trust to luck that the operator has fully absorbed the instruction and will be able to do the work correctly. Naturally the instructor goes back to the operator's machine to see if she has correctly learned the operation and it is *in this sense* that she "constantly supervises" the *work* of the operators. This is as much for the benefit of the operators as of the respondent because then the operator has less repair work. We submit that the Board's interpretation of Mrs. Reeves's statement and the conclusion drawn therefrom constitute a distortion and warping of the meaning of Mrs. Reeves's statement, and the language above-quoted of the Court in the *International Shoe case, supra*, l. c. 38, as to "hidden meanings" is here again applicable.

The finding that instructors "report to the office weekly" to go over the cards, does not connote any supervisory authority in the instructors—a payroll clerk makes

up the payroll and presents it to his superiors but that does not make him supervisor over all the persons listed on the payroll. The fact that the instructors report to the office may indicate that Mr. Baty is *their* supervisor but it carries no implication that the instructors are supervisors—janitors and all types of non-supervisory employees have to report to their superiors concerning their work.

The Trial Examiner finds that the instructors determine who shall take a day off when work is slack. This finding, presumably, is based on May Fike's testimony (I, 302). Her testimony contains a mass of contradictions and is wholly unreliable, so much so that even the Trial Examiner and Board refused to believe her story regarding the termination of her employment and refused her reinstatement, the Trial Examiner saying: "The undersigned does not credit this testimony of Fike" (X, 3891).

The laying off of operators, whether for a day or a season, is done by the office, and any part the instructor or thread girl may have in designating the rotation of any such day lay-offs among the operators is merely routine and clerical (II, 411-12, 450-51). May Fike's testimony doesn't warrant the Board's findings—but even if the Board's finding is taken literally, it is clearly not such a supervisory duty as to make the instructors "representatives of the management" (*NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332, 341-342).

We submit that these and the various other "conclusionary" and "inferential" findings of the Trial Examiner regarding the instructors and thread girls, do not support the ultimate finding that they are supervisory employees. A detailed discussion of all these subsidiary conclusions of the Trial Examiner would unduly extend this brief—he cites no evidence to support many of them.

and many of them carry no implication of supervisory authority—as for example, the finding that instructors are "carried on a time worker's pay roll, while the operators are paid on a piece rate basis." (X, 3852). The bundle boys and janitors are also on the time worker's pay roll—are they therefore also supervisors? The finding that the instructors "are responsible to Baty for the quality and quantity of work in their respective sections" is not supported by the evidence. The instructors have nothing to do with the "supply" of work reaching the sections—if no work comes, the section does no work; if work does come, the operators are glad to do as much as they can for their pay is on a piece work basis (II, 450-1).

But perhaps the most amazing conclusionary finding of the Trial Examiner is that the operators didn't know of the change in the authority of the instructors made in 1935 by Mrs. Reed and Mr. Baty (X, 3851, note 17).

The Trial Examiner, faced with incontrovertible evidence that in 1935 (*four years before* the complaint herein was filed), Mrs. Reed made a change in her factory set-up, by which Mr. Baty was put in complete charge thereof, and all supervisory authority taken away from the instructors, seeks to avoid the effect of this evidence by finding that the operators didn't know of this change! The fact of, and the reasons for, this change were clearly shown, but the Trial Examiner ignores this evidence because it interferes with his theory for finding that respondent dominated the DGWU through the instructors.

Concerning this change, Mrs. Reed testified (VII, 2121-2-3-4):

> "Mr. Ingraham: Mrs. Reed, when Mr. Baty became production manager, were any changes made in the authority given instructors?
>
> . . . . . .

A. Yes.

Q. (By Mr. Ingraham) What was the reason?

A. I had sat through all of the testimony in the NRA, and it was charged time and again that the instructors had favorites and discriminated, and it occurred to me that if I would put the authority in one person who would not be in such close contact with the operators, it would be better. This was the first time in the history of my business that I had anyone in charge of the plant that didn't have numerous other jobs to do—other responsibilities. Originally, I had been in charge of my plant myself. I had done all of my own buying, designing, and some selling, and a great many other things, and naturally, only had limited time to spend in the plant, then, when Mrs. Reeves assisted me and eventually took over the production management, she was in the same position. She had to manage the plant, but she also had this merchandising to do. So when I thought she had too much to do I gave her the merchandising and gave Mr. Baty the plant to run, with nothing else to do, and I expected him to spend his time in the plant. He had already been in there as Mrs. Reeves's assistant for some time. We had a very good system of cards—of keeping records of the operators, their work, and I felt very sure that he could take that over, and we would relieve the instructors of responsibility they had had of settling differences and acting on their own in anything that came up with the operators that they had had in the past. One reason was, Mrs. Reeves didn't have time to settle them herself. And they had, naturally, taken on a certain amount of authority, both with my running the plant and Mrs. Reeves running the plant.

When I talked with Mr. Baty about running it, we discussed these charges that had been made in the NRA about the instructors not being fair to this one and that one, and I felt he could take it over. And as far as the work was concerned, the instructor

would still sit down and show a girl how to do her operation, if she needed to. She would still know what kind of work she would give to the different operators. As far as putting the work through, it seemed that that would be a very possible thing to do.

So, when I put Mr. Baty in there, whether it was a wise thing or the right thing, I did give him the whole authority and expected him to take care of any differences that came up about the instructors, and to relieve the instructors of the authority that had caused the discussion in the NRA case. • • •

Q. What did an instructor do after Mr. Baty took over the plant?

A. Well, as far as turning her work out, she still did her instructing. She showed a girl how to do the work. She gave the work out to the operator, but when there was any difference of opinion—any operator that wasn't willing to do just what she was told by the instructor, she would wait until Mr. Baty came to settle it, or else she would let the girl pick out what kind of work she did want to do.

Q. Did the instructors under Mr. Baty have anything to do with the hiring, the disciplining, or the discharging of operators?

A. No, nothing whatever.

Q. Did the instructors have any authority to represent or speak for the management in any way?

A. No."

Mr. Baty definitely testified that after he took charge of the Production Department in June, 1935, he had not followed the former practice of discussing matters with instructors, but had taken away all supervisory powers from them. Mr. Baty testified as follows (II, 450-51):

"A. I changed the work of the instructors, I would say, to a very great extent. Prior to the time I took them, they were considered more or less supervisors

and entered into the discussions and recommendations as to the ability of different operators and made different recommendations as to which operators would be recalled after they were laid off, and after I took over the plant, I put instructors strictly on a basis of an instructor, and they were there to assist the operator in the performance of their work, and nothing else. They had no supervision over the girls, and it was none of their concern as to how the girls performed. They were to give them the work, take it away from them when it was finished, show them how to do it, if they didn't know how, and that was the extent that they were held liable for the girls in the section."

Mrs. Reeves testified that she knew of her own knowledge that Mr. Baty made this change in the authority of the instructors and that since that time the system has been that no instructor shall have any authority even to discipline (II, 425).

Lois Barnes (VIII, 2846) and Edith Dean (pp. 2862, 2864) testified that the change in the authority of instructors "was noticeable immediately" after Mr. Baty took over.

The Trial Examiner, in order to sustain his position that there was no change made in the authority of the instructors in June, 1935, makes the extraordinary finding that even if the change was made, the operators during the period from 1935 to 1937, never heard of it! (X, 3851, footnote 17.)

This illustrates the far-fetched nature of the Board's inferences in this case. Is it conceivable that 700 operators could work for over two years (from 1935 to 1937), along with the instructors and not know of the change in their relationship, introduced by Mrs. Reed and Mr. Baty in 1935? On the contrary, it is safe to say that every operator

knew within a few days and probably within one day, of the changes inaugurated by Mr. Baty when he took charge of the factory. There was no obligation on the part of respondent to send out a formal notice to the operators concerning the change.

Instructors and Thread Girls Not Regarded by Employes As Supervisors.

Finally, the Trial Examiner finds that the instructors "regard themselves as supervisors and are so regarded by the operators" (X, 3852). This is contrary to the overwhelming evidence. The eleven employee witnesses which respondent was permitted to place on the stand at the second hearing, testified that they did not regard the instructors as supervisors.

Oma Lee Cooper testified as follows (VIII, 2584, 2586, 2587):

"Q. Did the instructors, any instructor under whom you worked ever exercise any authority of hiring or firing or disciplining girls? * * *

A. No, I never saw them exercise any authority over any girl at any time. * * *

Q. Mrs. Cooper, from the time that you became employed with the Donnelly Company until August of 1939, did you at any time consider an instructor your boss?

A. No, I understood when I went there—I was told that the instructor was not the boss, that their job was to instruct, and that is all I ever saw any of them do.

Q. By 'instruct' what do you mean?

A. They sit down at the machine and show the girl how to work, and if the girl does not understand it, why, she explains to them just how the work is done, and sees that it is done right, and also she brings them work and their samples, and things like that."

To the same general effect:

Alice Freed (IX, 3206-7, 3195); Louise Garrett (IX, 3122, 3136); Lydia Phillips (IX, 3078, 3092, 3093, 3094, 3097); Ruby Clayton (IX, 3046, 3059, 3060); Ethel Riegel (IX, 3019, 3020); Jessie Mudd (VIII, 3000); Edith Dean (VIII, 2861, 2864); Lois Barnes (VIII, 2779); Mary Warth (VIII, 2731).

The Trial Examiner stopped respondent and intervener from showing this by the remainder of the "1200 employees," on the ground that further evidence thereof would be cumulative—but notwithstanding such ruling, the Trial Examiner now makes a finding directly contrary to such overwhelming evidence. We respectfully submit that such finding is not and can not be based on the *evidence* but must be, and is, grounded in the bias and prejudgment of the issues by the Trial Examiner, and likewise by the Board, which merely adopts the Trial Examiner's findings "lock, stock and barrel."

The Board's witness, May Stevens, had this to say of an instructor's work (X, 3688): "The work I did maybe would have been classed as inspector work or instructor's work. * * * Well, that would be maybe showing a girl about a certain class of work or something. I believe that would be an instructor's duty. I have done that at times." (And she was a member of the ILGWU.)

We respectfully submit that the Board's finding that the respondent continued to hold the instructors and thread girls, out to the operators as supervisory employees, after their supervisory powers were taken away from them by Mr. Baty, shortly after June 25th, 1935, and the Board's inference that the operators did not know of this change in 1937, nearly two years later, are a little short of fantastic.

And, so far as the thread girls are concerned, there is no evidence that they ever have exercised any supervisory authority. In the former decision the Trial Examiner and Board did not find the thread girls to be supervisory employes. Now, in the present finding, the Trial Examiner just throws them in with the instructors for good measure. This finding is contrary to the direct testimony of the eleven witnesses whom respondent was permitted to call in the second hearing.

The Trial Examiner refused to permit Respondent to show that instructors in other garment plants were not regarded as supervisory employees and were eligible for membership in the ILGWU. Respondent's offers of proof on this subject (Ex. 1-SSSSS, Ex. 1-TTTTT and Ex. 1-UUUUU, X. 3787-3792) were denied by the Trial Examiner (X, 3782). Then, after refusing to receive this evidence, the Trial Examiner and Board proceeded to convict respondent on the ground that the instructors and thread girls were not proper members of the DGWU! (See Ranco, Inc., and other cases decided by the Board itself, quoted *supra*, pp. 81-83.)

The instructors punch the time clock in the factory (II, 413). Many operators earn more money than the instructors.

We respectfully submit that the evidence does not support the Board's finding that the instructors and thread girls are "supervisory" employees, or any of the findings based thereon.

(3) Rose Todd Was Not a Supervisory Employee.

(a) ROSE TODD'S DUTIES WERE NOT "SUPERVISORY."

The Board finds that Rose Todd's position was one "involving duties of a supervisory nature" (X, 3856).

Rose Todd's work for the respondent was fully described in the evidence and shows conclusively that she was

not a "supervisory" employee. The Board's own description of her duties shows on its face that her work was not of a supervisory character (X, 3854).

Her salary at the time the DGWU was organized in April, 1937, was $130 a month (I, 31)—obviously not the salary of a supervisory employee, considering the length of time (some eleven years) that she had been with the company.

Miss Todd described her own duties as follows: She formerly worked for respondent, left its employ in 1931, and returned in 1933. At that time she was told she would have to take whatever work there was to give her (I, 30); she just filled in one place and another (I, 29); she was thread girl for a time and worked in the modeling department for a time and since about December, 1936 (I, 28), her principal work has been that of "supply girl" for the sewing sections; that is keeping the sections supplied with thread, notions, etc. (I, 27). She testified (I, 28):

> "Q. It is your job then to check up on the delivery of these various notions and supplies and material that should be at the various departments or sections?
> A. That is right. * * *
> Q. Do you have any assistant?
> A. No."

Mrs. Reeves describes Rose Todd's work as follows (II, 410-11):

> "Q. Will you state, if you know, what position Rose Todd holds with the Donnelly Garment Company, or what her duties are?
> A. Well, Rose Todd works in the factory, and she is a—I would say a sort of a go-between between the sections that are actually working on the garments, helping them check up. In an organization of that

kind there are lots of things that get misplaced, like lace, buttons, and things like that, and she assists in getting things to the section that they need to work with, and notifying anyone if the operators do not have what they need to work with, such as if we had a cut of work downstairs and we didn't have the proper kind of thread she would check up on it and notify me. And the same, whether it be lace, buttons, rickrack or whatever it is.

Q. Is Rose Todd in a supervisory position?

A. She is not."

Mr. Baty described her work as follows (II, 467):

"Q. (By Mr. Ingraham) Mr. Baty, does Rose Todd hold any supervisory position at the Donnelly Garment Company?

A. She does not.

Q. What work does she perform? * * *

A. She checks with the sections all over the plant, looking for merchandise that is delayed, dresses and bundles—checks to see what they need in the way of thread, lace, buttons or any other notions. * * *

Q. (By Mr. Ingraham) In 1937 what did she do?

A. She was working on the same work that she is now, checking delivery of notions and supplies to the sections" (II, 468).

Mrs. Reed testified as follows concerning Rose Todd:

"Q. Mrs. Reed, was Rose Todd an employee who had any authority to speak for the management.

A. She did not.

Q. Do you recall what work she was doing when she was last employed by the company?

A. Yes. She went into the different sections to see if they had sufficient thread and findings to complete their bundles, if there had been any errors made in sending down the proper amount of findings, so that the merchandise could go out promptly. That was her

real job. Anything she found they were wanting in the section, she would go back to the notions department or thread department and send it down." * * * (VII, 2116).

"Q. Now, Mrs. Reed, when Rose came back did she have any ability (authority) with respect to hiring or firing or disciplining any employees?

A. Absolutely none whatever.

Q. Was there anybody over whom she was boss in any way?

A. No.

Q. This work you say she did, findings work, did she have assistance in doing that?

A. She did it herself. She went all through the plant, because here and there the work would be held up because the right colored thread didn't come down, or there should have been 100 yards of pleating and maybe only 90 yards came, and the operators and the instructor would be busy, and they would throw it aside, and some times whole cuts of (fol. 3261) work would be held up for some small thing, and it wouldn't always be reported promptly, so her job was to go through and see if there was any work piling up that needed something to put it through, and then she would go back and get that or report it to the girl who sent out the findings. She had no one assisting her. She was in no place of responsibility, except to see that these trimmings and findings would be sent down to the section so that the work could go on through.

Q. Did you ever discuss with Rose Todd the formation of the Donnelly Garment Workers' Union?

A. I did not.

Q. Did you ever have any discussion with Miss Todd with reference to the Loyalty League?

A. I did not" (VII, 2117).

Also see pp. 2157, 2167.

It certainly can not be reasonably contended that the duties of Rose Todd constitute duties of a supervisory

character, and we submit that any inference to that effect is unwarranted by the evidence.

That the Board itself does not really feel that Rose Todd was a supervisory employee, is shown by its statement (X, 3857): "Irrespective of Todd's supervisory status * * *."

(b) Rose Todd As an "All-Around Man."

The Board refers to the testimony of Mr. Swinney, president of the First National Bank, that he had known Rose Todd for ten to twelve years as "a kind of all-around man for the company," and that she had come into the bank for several years as respondent's representative (X, 3856).

However, the context of Mr. Swinney's testimony shows that in referring to her as an "all-around man" he did not refer to her as being a "supervisory" employee, and no such "hidden meaning" should be read into it (*NLRB* v. *International Shoe Co.*, (C. C. A. 8) *infra*, 116 F. 2d 31, l. c. 38). Mr. Swinney testified (II, 718x) that his contact with Rose Todd was: "just coming and going, bringing some stuff up to my office, or something of that kind; just in a general way." This does not indicate in the slightest that by referring to her as an "all-around man" he meant she was a "supervisory" employee, nor support the Trial Examiner's finding that she was a representative of the management in the sense used in labor cases. Of course, an office boy who brings papers to a bank does so "as representative" of his employer—and it is apparent that is what Rose Todd did, and that is the type of work Mr. Swinney referred to.

(c) Rose Todd and the Fern Sigler Incident.

The Board contends that Rose Todd's participation in the Fern Sigler demonstration of April 23, shows that she

occupied a close and confidential relation to the management and "represented the management." The Board seizes on her use of the word "we" in Board's Exhibit 5 (III, 801-7) as showing this (X, 3857). But employees generally use the word "we" when speaking of the companies for which they work. The language must be construed in the light of the surrounding circumstances. Rose Todd used the word "we" when she was referring to herself and to the employees as a group. For example, when she said "It has always been the practice here that if *we* had any complaints to make, *we* made them" (III, 805), she obviously did not refer to the complaints of the management but to complaints of the *employees*, of which she was one. Likewise, when she said, "What do you think you have gained that *we haven't* by joining the union?" (III, 803), and "You expect the majority to rule if they believe like you; *we* expect it to rule when they believe like we do", (p. 803). In such quotations Rose Todd when she used the word "we" was not referring to the management but to the employees having the same views that she had. But the Board attempts to find "hidden meanings" and implications in Miss Todd's spontaneous and natural use of the word "we"—as said by this Court in *NLRB* v. *International Shoe Co.*, *supra*, 1. c. 38:

> "But in the most fantastic fashion the Board and counsel find *hidden meanings* in innocent words and phrases, almost as if the interview had been written in some abstruse code."

At I, 61, the Board's counsel asked Miss Todd: "Q. What do you mean by 'we'?" And she answered: "A. The employees." But the Board now disregards her answer and seeks to distort her later use of the word "we" into meaning that she referred to the management or herself and the management. This is another of the many

unfair and nonjudicial inferences made by the Trial Examiner and Board from "innocent words and phrases" condemned by the Court in *NLRB* v. *International Shoe Co., supra*, and requires us to unduly extend this brief to reply thereto.

We submit that the evidence shows that Rose Todd, in this whole Fern Sigler incident, was merely speaking for *herself*, or *as one of the employees*. She testified with reference to said incident as follows (I, 156-7):

"Q. (Interrupting) Just a moment. I asked you the simple question, in what capacity were you talking?

A. Just as an employee, just as one of them.

Q. Not for the Loyalty League?

A. No, sir.

Q. Nor for any group?

A. No, sir, *not other than as one of the employees.*

Q. Then you said: 'However, they felt so keenly about it we don't think we can do anything about it.' Did you mean just yourself then?

A. I meant the employees.

Q. Were you representing the employees?

A. No, I wasn't. I don't know. Maybe I didn't explain the use of the word 'we' very clearly. I wasn't speaking for anybody. I was just using 'we' without any particular thought about it.

* * * * * * *

Q. Were you just talking for yourself there, or were you talking for the management?

A. Speaking for myself."

Even if she had been a minor supervisory employee, as the Board claims she was, the expression of her individual views would not justify a finding against her employer. As was said by the Court in *NLRB* v. *Mathieson Alkali Works*, (C. C. A. 4) 114 F. 2d 796, 802:

> "But mere isolated expressions of minor supervisory employees, which appear to be nothing more than the utterance of individual views, not authorized by the employer and not of such a character or made under such circumstances as to justify the conclusion that they are an expression of his policy, will not ordinarily justify a finding against him."

The Board finds (X, 3857):

> "After the demonstration in Sigler's section and the conference in the office *it was Todd* who finally sent the employees back to work."

This is not justified by the evidence. In the first place the Board's statement just quoted is a warped presentation of the testimony. Rose Todd in testifying about the statement, said: "I didn't go down and send anybody back to work" (I, 80). The testimony was that the girls refused to go back to work unless Mrs. Sigler left, and that it was Mr. Baty's orders that caused them to return to work. Mr. Baty testified (II, 450):

> "A. I went down to the sixth floor, the machine where Fern Sigler was working, and got Fern Sigler to go to the office, and at the same time I turned and instructed the girls to all get back to their machines and get to work. * * * I heard shouts from amongst the crowd that they wasn't going to work until Fern Sigler left" (To same effect see II, 495-6).

This warped presentation of the testimony of Rose Todd further shows the Board's evident prejudgment of the case against respondent and its willingness to base adverse findings on isolated statements even though disproved by other evidence.

There is nothing to indicate that Mr. Baty and Mrs. Hyde "acquiesced in all that Miss Todd said" as the Board finds (X, 3857). They probably felt that Miss Todd

was entitled to express her opinion the same as Fern Sigler had the right to (and did) express hers.

The fact that Mr. Baty let the two employees, Rose Todd and Fern Sigler, argue their views back and forth does not mean that Rose Todd was "dominating the scene," as the Board finds, or show that she was a supervisory employee, as the Board infers. Mr. Baty was an executive, interested in keeping the plant at work and solving the problem with Mrs. Sigler as best he could; he may have thought the best way to do so was to let the two employees express themselves and thereby relieve their minds. He interposed when he thought proper and said that he could not send 700 girls home and keep one, and that it would be best for Mrs. Sigler to go home for a few days until things quieted down. This was justifiable (*NLRB* v. *Asheville Hosiery Co.*, (C. C. A. 4) 104 F. 2d 288, l. c. 292). It is highly significant that the Board or ILGWU did not produce Mrs. Sigler as a witness, or find that respondent discriminated against her.

There is nothing in the entire Exhibit (Board's Ex. 5, III, 801) indicating any opposition by the management to the ILGWU or to Mrs. Sigler's belonging to it. Mrs. Hyde said "It is perfectly all right. We have no objections." Mr. Baty and Mrs. Hyde both said repeatedly (Board's Ex. 5) that they would call Mrs. Sigler back to work when things quieted down (although they then knew of her affiliation with the ILGWU), and Mr. Baty testified (II, 499) that he instructed Mrs. Hyde to call Mrs. Sigler back to work and that she called but did not get in touch with her (and the Board finds that the respondent tried to call Sylvia Hull back to work even though it was then known that she was a member of the ILGWU).

We submit that the Fern Sigler incident wholly fails to show any basis for the Board's finding that Rose Todd

"represented the management," and that the Board's findings with reference thereto merely exemplify the Board's bias and prejudice against respondent.

(d) Re Rose Todd Having a Desk.

The Board in the trial of this case spent much time inquiring whether Rose Todd had a desk and where it was, and the Board finds (X, 3855) "Todd was assigned a desk in the factory—first on the ninth floor and later on the seventh floor—". We submit that any inference that Rose Todd was a supervisory employee because she had a desk at which to do her work or because the desk was on the ninth or seventh floors, is far fetched and wholly unwarranted by the evidence or the law. It is another case of attempting to give a "hidden meaning" (*NLRB* v. *International Shoe Co., supra*) to one of the most innocent and ordinary of circumstances—having a desk at which to do one's work.

(e). The Employees Did Not Regard Rose Todd As a Supervisory Employee.

All the employees whom respondent was permitted to call as witnesses testified that they did not regard Rose Todd as a supervisory employee, or as a representative of the management, and that they felt no compulsion in joining the DGWU because of her activity on behalf of the DGWU.

Hazel Saucke testified as follows (VIII, 2643, 2644):

"Q. Did you ever get the impression that Rose Todd represented the management in any capacity?

A. No, sir.

Q. Did she ever hold herself out as speaking for the management in connection with the formation of a union, or anything having to do with the union?

A. No, sir."

To the same general effect:

Mrs. Freed (IX, 3207, 3208); Mrs. Garrett (IX, 3122, 3137); Lydia Phillips (IX, 3094); Ruby Clayton (IX, 3058); Ethel Riegel (IX, 3019, 3024); Edith Dean (VIII, 2859); Lois Barnes (VIII, 2830); Mary Warth (VIII, 2723, 2726); Oma Lee Cooper (VIII, 2583, 2584, 2592, 2593); Jessie Mudd (VIII, 2928, 2929); Mary Warth (VIII, 2723-4).

To this should be added the offered testimony to the same effect, of the remaining 1,200 employees proffered by respondent and intervener.

Furthermore, it is significant that the Board's witnesses did not testify that they regarded Rose Todd as a supervisory employee or as representing the management, although the Board placed some *eight* employee witnesses on the stand.

Thus, under the test laid down in the *International Machinists case, Supra,* the respondent is not chargeable with her activities—as the employees had no reason to believe (and, in fact, did not believe) that she was "speaking for the management" in any of her activities referred to by the Board.

Re: Other Alleged Supervisory Employees.

The Board in its decision (paragraphs 3 and 4, X. 3858-9) devotes scant space to Hobart Atherton and the other alleged supervisory employees, and we shall therefore reply very briefly.

Hobart Atherton. The Board's statement of Mr. Atherton's duties shows he was not a supervisory employee. He testified that he was clerk in the maintenance department, that as clerk he "transmitted" orders from Mr. Baty to the persons who were to do the work, and helped them to do it if necessary—"I assist any of the fellows in the maintenance department that need help

on anything. If it is necessary to move a bin, I help them move it * * *" (II, 593).

Mrs. Reed testified (VI, 2117-18) that Mr. Atherton did not hold a supervisory position.

The employees testified that they *did not regard* Mr. Atherton as a supervisory employee (VIII, 2934-5; IX, 3208-9, 3137, 3095-6, 3058, 3024, 2872, 2644, 2593), until the Trial Examiner stopped respondent from calling further witnesses.

None of the Board's witnesses testified that Mr. Atherton was a supervisory employee.

Heath Cowan and Ortense Root. We find no evidence that these employees were supervisors or that they did or said anything that smacks of coercion in the slightest degree.

Mrs. Gray. The employees testified that they did not regard Mrs. Gray as a supervisory employee (VIII, 2944-5; IX, 3218, 3146, 3098, 3065).

Mrs. Reed testified (VII, 2128-9, 2232-3) that Mrs. Gray was one of the clerks who did the selling in the outlet store, and that she had no supervisory authority.

Mrs. Tyhurst. Mrs. Reed testified that Mrs. Tyhurst was not a supervisory employee (VII, 2127, 2216).

The employees did not regard her as a supervisory employee (VIII, 2945; IX, 3065, 3098, 3146, 3218).

Marvin Price. Mrs. Reed testified *re* Mr. Price's duties and that he had no supervisory authority (VII, 2127-8).

The employees did not regard him as a representative of the management (VIII, 2945; IX, 3098-9, 3146, 3158).

Ted Scoles. Mr. Scoles was a cutter. He had no supervisory authority (Mrs. Reed, VII, 2241).

The employees did not regard him as a supervisory employee (VIII, 2946; IX, 3146-7; 3219).

Mrs. Bogart. Mrs. Bogart worked in the dividing department. She had no supervisory authority (Mr. Baty, II, 477).

The employees did not regard her as a supervisory employee (VIII, 2945; IX, 3065-6).

Mrs. Strickland. Mrs. Strickland was a pattern maker. She had no supervisory authority (Mrs. Reed, VII, 2133-4).

The employees did not regard her as a supervisory employee (I, 38; VIII, 2946; IX, 3147).

We respectfully submit that the Board's findings that the foregoing employees were supervisory employees or "representatives of the management" are not supported by the evidence, and are contrary to the authorities.

The Board evidently considers an employee a representative of the management if he is "in charge" of any work, even if it were merely seeing that the waste paper baskets were emptied or if he "transmits" orders from the manager to workers, as Mr. Atherton did. This conception is erroneous under the authorities: *Ballston-Stillwater Knitting Co.* v. *NLRB*, (C. C. A. 2) 98 F. 2d 758, 761-2; *NLRB* v. *Swank Products, Inc.*, (C. C. A. 3) 108 F. 2d 872, 875; *NLRB* v. *Sands Manufacturing Company*, 306 U. S. 332, 341-342; *Humble Oil & Refining Co.* v. *NLRB*, (C. C. A. 5) 113 F. 2d 85, 92; *Martel Mills Corporation* v. *NLRB*, (C. C. A. 4) 114 F. 2d 624; *Magnolia Petroleum Co.* v. *NLRB*, (C. C. A. 5) 112 F. 2d 545; *NLRB* v. *Mathteson Alkali Works, Inc.*, (C. C. A. 4) 114 F. 2d 796; *Cupples Co. Mfrs.* v. *NLRB*, (C. C. A. 8) 106 F. 2d 100; *E. I. Du Pont de Nemours Co.* v. *NLRB*, (C. C. A. 4) 116 F. 2d 388, 399-400; *NLRB* v. *Sparks-Withington Co.*, (C. C. A. 6) 119 F. 2d 78, 81; *NLRB* v. *Sun Shipbuilding & Dry D. Co.*, (C. C. A. 3) 135 F. 2d 15; and *NLRB* v. *Clinton Woolen Mfg. Co.*, (C. C. A. 6) 141 F. 2d 753, 757.

Even the acts of *supervisory* employees may not be condemned unless they are of a *coercive* character (*Texas & N. O. R. Co.* v. *Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548, l. c. 568; *Foote Bros. Gear & Mch. Corp.* v. *NLRB*, (C. C. A. 7) 114 F. 2d 611, l. c. 628; *Humble Oil & Ref. Co.* v. *NLRB, Supra*, l. c. 88.

Re the Activities of Alleged Supervisory Employees, Generally.

Entirely aside from the duties of the above-named employees, we call attention to the following testimony as to supervisory employees, generally, which makes a clean sweep of all the Board's contentions as to the *effect on the employees* of the participation of instructors, thread girls, Rose Todd, and all other alleged supervisory employees, in connection with the DGWU:

Mrs. Freed testified (IX, 3210):

"Q. Was there *anybody* who attended the meeting of April 27, 1937, at which the Donnelly Garment Workers' Union was formed, *that you regarded* as a supervisory employee or a boss or a representative of the management?

A. Not that I saw."

To the same general effect:

Mary Warth (VIII, 2726-7); Oma Lee Cooper (VIII, 2593, 2599); Louise Garrett (IX, 3138, 3139); Lydia Phillips (IX, 3078, 3092, 3093, 3094); Ruby Clayton (IX, 3046); Jessie Mudd (VIII, 2936, 2937); Lois Barnes (VIII, 2817); Mary Warth (VIII, 2730); Hazel Saucke (VIII, 2631, 2632); and all the other employees except for the Trial Examiner's ruling stopping further evidence as cumulative (IX, 3253).

We respectfully submit, *first*, that the persons found by the Board in the case at bar to be supervisors, were

not supervisors but were working employees entitled to the benefits of the NLR Act, and, *secondly*, that none of the acts of such alleged supervisors, *taken in their setting*, were *reasonably likely* to have restrained the employees' choice. Nor can it *fairly be said* that the employees had *just cause to believe* that such alleged supervisors were acting for the *management* (*International Association of Machinists* v. *NLRB*, *supra*).

B-3.

The Board's Findings and Conclusions with Reference to the Loyalty League Are Not Supported by the Evidence.

1. The Loyalty League Was Not a "Prior Labor Union" and the Holding of the Newport News Shipbuilding Case Is Not Applicable.

The Board seizes on the existence of this organization to claim that the DGWU was an outgrowth of or successor to the Loyalty League and that the respondent, through the Loyalty League, dominated and interfered with the free choice of the employees in the formation of the DGWU, evidently hoping to bring the case at bar within the purview of *NLRB* v. *Newport News Shipbuilding Co.*, 308 U. S. 241, and other similar cases in which it has been held that a new plan or union was an outgrowth of an old union.

At the outset we wish to point out that the situation with reference to the Loyalty League here bears no resemblance to the situations existing in the Newport News case and similar cases. The Loyalty League was not a labor union or "representation plan" in any sense of the word. It had never had any dealings with the management relative to working conditions, wages, or other like matters. It performed none of the functions of a labor union or representation plan. It was a purely social organization. It had no dues; it had no regular meetings; it kept no minutes. Its only activities were the

holding of parties or dances of a purely social nature. The organization of the DGWU did not grow out of or affect the Loyalty League. The Loyalty League continued in the same way it always had, engaging only in social activities, while the DGWU from its inception was a labor union and engaged in all the activities of a labor union.

That the activities of the Loyalty League were purely social would seem to be definitely established by the testimony of the Board's own witness, Etta Dorsey, an admittedly hostile witness who would not have hesitated to characterize the Loyalty League differently if there had been the slightest basis for doing so. She testified (IX, 3362-3):

"Q. Do you know whether you had more of the Union meetings than the Loyalty League meetings?

A. I know there were some concerning the Union, the Loyalty League meetings were more or less social affairs, you know.

Q. As a matter of fact, that was all the Loyalty League was, a social group?

A. Yes, a kind of get-together and get acquainted affair, and plan on good times, and things like that.

Q. Yes. You had parties and picnics?

A. Yes, *that was the object of it.*"

Also May Fike, one of the Board's chief witnesses and a witness highly adverse to the petitioner, testified that she joined the Loyalty League at the start (Transc. 1264) and attended *all* its meetings (Transc. 1273); and she says social events were its only activities (Transc. 1411):

"Q. Outside of having dances, and such gatherings, what, if any, did the Loyalty League do?

A. *They just had their entertainments is all I know of.*

Q. That is all you ever knew of, was just entertainments?

A. That is all I remember of."

Also, the Board's witness, Mrs. Keyes, testified (X, IV, 3653):

"Well, there was no activity in the Loyalty League other than little parties they have."

Thus, three of the Board's main witnesses, in addition to Rose Todd, corroborate respondent's position that the Loyalty League *engaged only in social activities.*

The following witnesses testified to the same general effect, namely, that the Loyalty League was purely a social and not a labor organization: Mrs. Lynn Davis (II, 543); Hobart Atherton (II, 561); Mrs. Nellie Stites (II, 622); Mrs. Claris Martin (II, 652); Mrs. Pearl Field (II, 676); Mrs. Ruby Lago (II, 678-9); Oma Lee Cooper (VIII, 2581-2); Hazel Saucke (2632); Mary Warth (2718, 2727); Lois Barnes (2777-8); Edith Dean (2860); Jessie Mudd (2927-8); Ethel Riegel (IX, 3011); Ruby Clayton (3052); Lydia Phillips (3090); Louise Garrett (3129-30); Alice Freed (3196).

In addition to the testimony of the foregoing witnesses, all to the same effect, should be added the testimony of all the 1,200 employees which respondent and intervener would have called in the second hearing if they had not been stopped by the Trial Examiner (IX, 3253, 3254; and see offers of proof, Exhibit 1-OOOO, Exhibit 1-RRRR, III, 762-3, 764), all to the effect that the Loyalty League *was entirely separate* from the DGWU and that they so understood; that the Loyalty League was a purely social organization with no labor union activities and that the Donnelly Garment Workers' Union *was not a continuation or successor to the Loyalty League in any way*

and that they so understood, and that *both continued to function in their respective fields.*

Not a single witness of the Board or ILGWU testified to the contrary!

In *Cupples Co. Manufacturers* v. *National Labor Relations Board,* 106 F. 2d 100, there was an organization known as the "Loyalty and Service Club," admittedly established by the company. 95% to 97% of the employees belonged to the Club (l. c. 106). Yet the fact that its members also belonged to the union, was not held to constitute domination by the management through that Club.

One of the most unfair inferences drawn by the Trial Examiner and Board is that everything done by the employes is done by the Loyalty League—merely because most employes belonged to the Loyalty League.

2. The Loyalty League Was Not Formed, Dominated or Used by Respondent, and Its Alleged Activities Are Not Attributable to Respondent.

(a) THE LOYALTY LEAGUE WAS NOT FORMED BY RESPONDENT.

The persons named by the Board as active in forming the League were Mrs. Gray and Mrs. Strickland. These were not supervisory employees, as we have shown (Point B-2) although the Board finds that they were such. Under the holdings in the *Magnolia* and *Ballston-Stillwater* and other cases, *supra,* Mrs. Gray and Mrs. Strickland were clearly "employees to whom the Act guarantees the right of self organization," and their activities in the Loyalty League cannot be attributed to respondent.

We submit that the Board's finding that the Loyalty League was formed by the respondent because Mrs. Gray and Mrs. Strickland were active in organizing it, is not justified by the evidence.

(b) The Loyalty League After Its Formation Was Not Dominated or Used by Respondent.

We further submit that there is no evidence to support the Board's finding that the respondent "used" the Loyalty League, or "acted through" the Loyalty League to coerce or interfere with the employees in their right of free choice of bargaining agents.

Mrs. Reed testified (VII, 2066-7) most positively that the respondent did not act through the Loyalty League in connection with the formation of the plant union (DGWU) also, Mrs. Reeves (II, 408-9; IV, 1116-17); Mrs. Keyes (II, 431); Mr. Baty was not a member (II, 468).

The employees which respondent and intervener were permitted to call, testified that the Loyalty League brought no pressure to bear upon them in connection with the formation of the DGWU, or interfere in any way with their freedom of choice as to union affiliations.

Oma Lee Cooper (VIII, 2582); Hazel Saucke (2632); Mary Warth (2718, 2723, 2731); Lois Barnes (2778); Edith Dean (2860-61); Jessie Mudd (2927); Ethel Riegel (IX, 3010); Ruby Clayton (3053); Lydia Phillips (3085, 3091); Louise Garrett (3129-30); Alice Freed (3196).

To this should be added the testimony of the "1200 employees" offered by respondent and intervenor (Exhibits 1-OOOO, 1-RRRR, III, 743, 765).

We submit that there is not a scintilla of evidence that the Loyalty League was dominated by respondent nor any basis, save the trial examiner's imagination and conjecture, for the Board's findings and conclusions that the petitioner "used" the Loyalty League to interfere with the employees in their rights under the Act.

B-4.

The Board's Findings and Conclusions As to the "March 2nd Statement" Are Not Supported by the Evidence.

It clearly appears that the March 2nd Statement was conceived and circulated by two non-supervisory employees, without the knowledge of officials of the company, and was signed voluntarily by the employees generally (IV, 1290, 1296-7, 1294).

The Board evidently recognizes this, and attempts to base a finding of coercion upon the testimony of Mrs. Keyes that Mrs. Reed had said to her that "she would like to have the petition 100%," and that she (Mrs. Keyes) the next day suggested to Pauline Shartzer that she take the petition around and have it signed. It will be noted that Mrs. Keyes did not say that Mrs. Reed asked her to procure the additional names. Also it should be noted that this disagrees with Miss Shartzer's testimony (given in the injunction trial *before* the Labor Board complaint was filed, IV, 1293-4):

"Q. How did you come to get those sheets? Did you ask for them, say you wanted to circulate them?

A. In the first place, we had discussed it on the 10th floor, the office of the plant. I went to the 9th, in some of my work, and someone asked me if I had seen this petition. *I asked them what it was*, and I copied it as soon as I could, and compared my copy with Mrs. Sprofera, and in that way I had a copy of what was written up.

Q. What did you do?

A. I took it to the 10th floor and the 9th floor, and anyone we missed on the 9th floor, I asked them to sign them if they cared to.

Q. Were these papers signed voluntarily?

A. They were."

(This was done on March 2d; it was only the last page which was signed on March 5th, V, 1649.)

It should also be noted that Mrs. Reed testified that she did not know how they happened to obtain the further signatures (VII, 2433-4):

> "Q. Did you learn they did get another petition on the 5th of March?
>
> A. I learned that another petition, another page, was gotten up later.
>
> Q. And you don't why that was done?
>
> A. No.
>
> Q. You had nothing to do with it?
>
> A. *I had nothing to do with it, Mr. Langsdale.*"

But if Mrs. Reed did casually say to Mrs. Keyes that she was going to put the March 2nd Statement in the cornerstone of her new building and would like the names of all employees on it, it would not constitute "domination," especially as some 95% of the employes *had already signed the paper voluntarily.*

The Board seeks to imply something sinister from the fact that a picture was taken by the Kansas City Star of the employees who presented the March 2nd statement to Mrs. Reed. But this is dissipated by Mrs. Reed's testimony which shows that *not* she, but Mr. Roberts of the Star, suggested the taking of the picture (VII, 2076-7).

In the case of *NLRB* v. *Brandeis & Sons*, (C. C. A. 8) 145 F. 2d 556, 567-8, an anti-union petition was circulated during working hours *shortly before the election* and was signed by 204 employees including several *assistant buyers* and one *department head.* It was held not coercive and hence permissible. The March 2nd statement in the case at bar had no elements of coercion but was conceived and circulated by the employes.

In other cases the circulation of statements or petitions among employees have been held no violation of the Act. *NLRB* v. *Sun Shipbuilding & Dry Dock Co.*, 135 F. 2d 15; *NLRB* v. *Bradford Machine Tool Co.*, 138 F. 2d 246; *NLRB* v. *Draper Corp.*, 145 F. 2d 199, l. c. 205; *NLRB* v. *Appalachian Elec. Power Co*, 140 F. 2d 217. In the last-cited case, the petition circulated expressed esteem for the manager, as did the March 2nd statement of Mrs. Reed's "humanitarian interest."

The cases cited by the Board at pages 43-44 of their brief are not in point. Most of them dealt with "votes" or "elections," a wholly different situation from the March 2nd statement here.

We respectfully submit that the circumstances regarding the circulation of the March 2nd statement not only do not show any coercion or restraint by respondent upon the employees, but on the contrary, these circumstances show that the overwhelming attitude of the employees against the ILGWU was voluntarily expressed *as early* as March 2, 1937, and *negatives all the findings of the Board that such attitude was produced by any acts of respondent subsequent thereto.*

B-5.

Respondent Did Not Dominate the Organization Meeting of the DGWU on April 27th.

The Board, in its former decision herein, found (A. 600): "The rank and file of the respondent's employees had heard nothing of the formation of a labor union prior to the meeting" (of April 27th). This shows that there was no domination, coercion or interference by the management with reference to the DGWU. Obviously, the employees could not be coerced with reference to something they *knew nothing about;* therefore there was no coercion *prior* to the organization meeting of April 27, 1937. The

evidence, including the minutes, as to what occurred at the April 27th meeting is very complete, and conclusively shows there was no coercion *at* such meeting (I, 54-59; II, 558-561; III, 821-830). And, as practically all of the 1,300 employees joined at *that* meeting, there was no *later* coercion. This covers the whole field.

B-6.

The Board's Findings and Conclusions As to Use by the DGWU of Company Property and Facilities Are Not Supported by the Evidence.

The Board stresses the use by DGWU members and officers of certain ditto and mimeograph machines, files, and other property or facilities of the respondent, as showing assistance by respondent to the DGWU and consequent interference with the employees in their free selection and administration of a labor union (X, 3883). We submit that the inferences drawn are unwarranted by the evidence and demonstrate the Board's bias and prejudice.

In the *first* place, the use of the property and facilities was inconsiderable and in terms of "assistance" to the DGWU it was wholly insignificant (I, 3560, 62, 62a, 107-8); in the *second* place the uses complained of were done after working hours (I, 60, 62a, 107); in the *third* place, it was not authorized by the management, and was unknown to the management (I, 62, 62a; II, 406-7, 411, 431, 468-9; VII, 2113, 2115); in the *fourth* place, if it had been known to the management, it amounted to no more than common courtesy between employer and employee (*Texas & New Orleans R. Co.* v. *Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548, 568); in the *fifth* place, similar use was not denied to anyone else; in the *sixth* place, the use testified to occurred mostly after the formation of the DGWU and could not have constituted any coercion or interference

with the employees in their selection of that labor union; in the *seventh* place, the evidence shows that the choice of the DGWU by the employees was so unanimous and so unquestionably their free and voluntary desire, that there is not the slightest basis for an inference that their choice of, or adherence to, the DGWU was affected in the remotest degree by any of these matters mentioned by the Board.

All the testimony was that such small use of respondent's facilities as was made—use of mimeograph machine one evening by boy (I, 59-60); use of ditto machine (I, 62); use of typewriter occasionally (I, 107)—was done outside working hours (I, 264, 396); that the company did not know of it (I, 62, 62a); that the bulletin boards are "used by anybody that cares to use them" (I, 129); that officials never authorized such use by the Union (Mrs. Reeves, II, 406-7; Mr. Keyes, II, 431; Mr. Baty, II, 479-480-1).

Mrs. Reed testified (VII, 2118) that the employees "have always used the telephones and still do"; that the Company has "always been generous" in letting the employees use equipment after working hours; that they used the sewing machines after working hours for personal use, until the Wage and Hour restrictions prevented; that the employees have always been permitted to pass notes through the sections; that she didn't know of notices being sent through the sections by the DGWU, but if the DGWU sent notices by bundle boys or by telephone, it was no different from what the employees had been doing for years (p. 2115); that as long "as we have had bulletin boards" (about fifteen years), "the employees have used them."

This is not a case where facilities are granted to one union and denied to another.

Under the foregoing circumstances the inconsequential use of the company's facilities is not "substantial evidence" of domination or support. *NLRB* v. *Mathieson Alkali Works*, 114 F. 2d 796, l. c. 802; *Ballston-Stillwater Knitting Co.* v. *NLRB*, (C. C. A. 2) 98 F. 2d 758, l. c. ....; *Cupples Company Manufacturers* v. *NLRB*, 106 F. 2d 100, l. c. 115; and Judge Riddick in his opinion in the court below (XIII, 54). See, also, *Republic Aviation Corp.* v. *NLRB*, 65 S. Ct. 982; *NLRB* v. *American Pearl Button Co.*, (C. C. A. 8) 149 F. 2d 258, 259; *NLRB* v. *Clinton Woolen Mfg. Co.*, 141 F. 2d 753 (headnote 2); and *Jefferson Electric Co.* v. *NLRB*, 102 F. 2d 949, l. c. 956.

The Board's finding that the employees were paid for time spent in attending union meetings is answered by our discussion of the finding that the March 18th and April 27th meetings were held "during working hours" (Point B-1, *supra*). Obviously, if the meetings were held *after* working hours, there would be no pay allowed—and it was so conceded at the trial (X, 3709): "Mr. Langsdale: It was never contended that any employee was paid for a meeting that started after working hours." All of the Respondent's witnesses who were permitted to testify, testified that they were not paid for attending any union meetings (X, 3711, 3718, 3723-4, 3728-9, 3732-3, 3738, 3742, 3744-5). Mr. Baty and Mrs. Copowicz testified there were no such allowances made (X, 3754, 3761-2). The early quitting hours, normally 3:50 to 4:10 (even with one hour overtime 4:50 to 5:10) shows there was no necessity for a meeting during working hours (II, 453-4). The testimony and offered testimony of the "1200" employees" is that *all* the meetings were held outside of working hours. We respectfully submit that the testimony of the Board's few witnesses to the contrary is inherently unreasonable and does not constitute "substan-

tial" evidence in view of the overwhelming testimony of the employes.

We respectfully submit that for all seven of the reasons mentioned at the beginning of this discussion there is no substantial evidence to support a finding or conclusion that the respondent assisted or dominated the DGWU by virtue of the *incidental, occasional* and *inconsequential* use, without respondent's permission or knowledge, of respondent's "property and facilities" referred to by the Board, or thereby interfered with the employees in the selection or administration of the DGWU.

B-7.

The Board's Findings and Conclusions As to Prompt Recognition of, and Bargaining with, the DGWU Are Not Supported by the Evidence.

The Board stresses the prompt recognition of the DGWU by respondent and the quick negotiation of agreements with the union as showing domination by respondent (X, 3878, footnote 47, 3882).

It is undisputed that nearly thirteen hundred employees joined the DGWU at the organization meeting on April 27, 1937, being practically all of the working employees, and that Rose Todd, chairman of the Executive Committee of the DGWU, presented evidence of this to Mrs. Reed on April 28, 1937 (I, 80a, 80b, 80c). Thereupon, it was respondent's immediate duty to recognize the DGWU, and to enter into bargaining negotiations with its committee. The Board's condemnation of respondent for complying with the law is unwarranted and demonstrates its bias and prejudice. *Cupples Company Mfrs.* v. *NLRB*, 106 F. 2d 100, l. c. 114; *McQuay-Norris Mfg. Co.* v. *NLRB*, (C. C. A. 7) 116 F. 2d 748, l. c. 751; *NLRB* v. *Dahlstrom M. Door Co.*, 2 Cir., 112 F. 2d 756, 757; *NLRB* v. *Piqua Munis-*

ing W. Prod. Co., 6 Cir., 109 F. 2d 552, 556; *NLRB* v. *Clinton Woolen Mfg. Co.*, 6 Cir., 141 F. 2d 753, 756; *NLRB* v. *Arma Corp.*, (C. C. A. 2) 122 F. 2d 153, 156; *Foote Bros. Gear & Machine Corp.* v. *NLRB*, (C. C. A. 7) 114 F. 2d 611, l. c. 618; *L. Greif & Bro.* v. *NLRB*, (C. C. A. 4) 108 F. 2d 551; *NLRB* v. *Bradford Machine Tool Co.*, 138 F. 2d 246, 248.

We submit that the prompt recognition by respondent of the DGWU was eminently justified by the showing made, and that the 2-months' period thereafter taken to negotiate the contracts was not unduly "quick." Mrs. Reed's testimony (VII, 2097-2110) regarding Respondent's exhibit 17-A to 17-J, XI, 4105, shows genuine discussion of the contract submitted by the DGWU, and several members of the DGWU committee and several officials of the company testified to the genuineness of the negotiations (I, 123-24; II, 562-572, 704j-704m, 456-467, 432a-437).

B-8.

The Board's Findings and Conclusions As to the Terms of Working Agreements Between Respondent and the DGWU, Including the "Closed Shop" Provision, Are Not Supported by the Evidence.

The Board finds (X, 3879-80) that the inclusion of certain provisions in the working agreements made between respondent and the DGWU shows domination and support of, and interference with, the DGWU by respondent. The Board apparently limits its criticism to two provisions: (1) the provision for a *closed shop*, and (2) the provision that the members of the executive or bargaining committee of the DGWU must be composed of employees *with at least one year's employment* in petitioner's plant.

The Board, in its previous decision, almost apologizes for its findings that these provisions show domination (A, 603):

The provisions criticised are not unusual or unique provisions in working contracts between unions and employers. Even if they were, there would be no justification for the Board's finding—the Trial Examiner repeatedly said during the hearing that the union could agree to any terms it saw fit—even to a minimum wage of $1.50 a week (I, 207). But, as stated, the provisions are not new or unusual—it so happens that the ILGWU itself puts such provisions in its contracts. To show this, respondent offered in evidence contracts made by the ILGWU with other garment manufacturers in the Kansas City area (Respondent's Exhibit 2—rejected, VI, 1653).

The Trial Examiner rejected these ILGWU contracts and refused to let respondent show such facts (II, 378hh-380; IX, 3270, 3274, 3782). The Board affirms this ruling, and then turns around and finds respondent guilty of violating the National Labor Relations Act because the DGWU agreed with respondent to the *same kind of provisions* that the ILGWU deems legal and proper and puts into its own agreements. This is another outstanding example of the bias of the Trial Examiner and Board against respondent.

The closed shop agreement was demanded by the DGWU (I, 90; II, 565, 704f). Mrs. Reed preferred an open shop (II, 704l; VII, 2095, 2097, 2387) and at first opposed the closed shop (II, 704l); but yielded on condition that it should not interfere with her choice in hiring employees (VII, 2097). That was entirely proper and is sanctioned by the Act itself.

B-9.

The Board's Findings and Conclusions As to the Appointment of Rose Todd, Mrs. Nichols and Miss Spalito on DGWU's Committee for Adjustment of Piece Work Prices Are Not Supported by the Evidence.

The Board makes much of the fact that the DGWU designated Rose Todd, Mrs. Nichols and Miss Spalito as a committee to represent it in the adjustment of piece work prices, claiming that this shows domination of the DGWU by respondent because a part of Mrs. Nichols' and Miss Spalito's work for respondent is the setting of piece work prices.

There is no evidence that the DGWU appointed this committee at respondent's behest and the Board's conclusion is pure conjecture. The committee was appointed at a meeting of the group chairmen on June 3, 1937 (III, 923). There can be no reasonable doubt that these three persons were appointed by the DGWU because they were the *best qualified* members to serve in that capacity. Should a union appoint its least qualified members on its committees or its best qualified members? The answer is obvious. A part of Mrs. Nichols' and Miss Spalito's work for petitioner is the setting of piece work prices (II, 417-8), and Rose Todd having formerly done that work (I, 33), they were undoubtedly the best qualified persons to represent the union on that committee.

That the committee properly functioned *in behalf of the DGWU* and was not dominated by respondent, is conclusively shown by the evidence concerning the adjustment of complaints as to piece work prices. Rose Todd testified (I, 231-2, 234-238, incl., 929, 932, 936, 944) concerning the satisfactory adjustment of complaints of various operators as to piece work prices. At I, 238 Miss

Todd testified concerning the satisfactory adjustment of many written complaints (contained in Intervener's Exhibits Nos. 15 to 15-BB).

The Respondent had no right to interfere with the DGWU in the handling of its internal affairs. If Respondent had interfered with the appointment of the union members which the DGWU wanted on its piece-work committee, the Labor Board would have jumped on it for so doing (Now, it seems to argue that respondent should have interfered).

According to the Board's theory, a union *could never appoint any employee* on any committee that has any dealing with the employer, for all employees "represent the employer" in some capacity, and hence the employer would be "sitting on both sides of the table." Certainly Congress did not contemplate that unions must place all negotiations between the union and the employer in the hands of "outsiders."

The cases cited by the Board at the top of page 69 are not applicable here. Those cases relate to an "entire union" or to the main "bargaining committee," not to a small sub-committee or shop committee, like the piece-work committee.

The Board says (p. 33) that Mrs. Nichols has "final authority" in setting piece work rates. This was not the testimony. She fixed the rates initially but if it was found they were not just, the rates were adjusted on complaints of *operators* or others (VII, 2144-2147; I, 231-238, 929, 936, 944). The Board's witness, Mrs. Skeens, testified that if a price was low on something "I would tell Mr. Baty that we needed more money on them" (IX, 3460) and that she thought "it was up to Mr. Baty to pass on grievances" (IX, 3461).

The evidence wholly fails to support the Board's findings on this matter.

B-10.

The Board's Findings and Conclusions As to Encouragement and Approval by Respondent of the April 23rd "Demonstrations," Are Not Supported by the Evidence.

The complaint charged respondent with having instigated certain demonstrations in its plant against Sylvia Hull and Fern Sigler on April 23rd, 1937 (A, 452).

These demonstrations were caused by resentment of the employees, created by a news item in the press which falsely stated that Sylvia Hull was going to the ILGWU convention at Atlantic City as representative of the Donnelly employees (XI, 4171).

The Board virtually admits that respondent did not "instigate" these demonstrations when it says in its first decision (A, 581):

> "Without deciding whether the respondent was responsible for originating and inciting these anti-ILGWU demonstrations we are convinced that the respondent condoned, approved and encouraged them."

But the Board finds that the respondent "approved and encouraged" the demonstrations. This is in the teeth of the evidence. The Sylvia Hull demonstration occurred early in the morning, about eight o'clock, before Mr. Baty arrived at the plant. Mrs. Hyde, assistant to Mr. Baty, went to the scene, *told the girls to go back to work,* talked to Sylvia Hull and Sylvia volunteered to go home saying: "I will go home. I didn't know the girls felt this way about it, or I wouldn't have done it" (II, 536); and the girls had returned to work before Mr. Baty arrived at the plant (II, 496).

Furthermore, Mr. Baty upon his arrival took all necessary steps immediately. Mr. Baty testified:

"A. I went down to the sixth floor, the machine where Fern Sigler was working and got Fern Sigler to go to the office and at the same time I turned and instructed the girls to *all get back to their machines and get to work*" (II, 450).

This evidence certainly doesn't show "approval and encouragement"; instead, it shows that Mr. Baty and Mrs. Hyde stopped the demonstrations as soon as they reasonably could, *and sent the girls back to work.*

The Board complains that the demonstrators were not disciplined or reprimanded. As said by the Court in *NLRB* v. *Asheville Hosiery Co.*, (C. C. A. 4) 108 F. 2d 288, l. c. 292:

> "No inference unfavorable to the management can reasonably be drawn from the fact that during the excitement then prevalent in the plant, the meeting was proposed until December 7, a few days after the ouster, or from the fact that the management undertook to prevent further violence, and to allay the resentment felt by a large majority of the employees, *by persuasive methods rather than by disciplinary action.*"
>
> See, also, *NLRB* v. *Clinton Woolen Mfg. Co.*, (6 Cir.) 141 F. 2d 753, 756.

The respondent's action must be viewed "in the light of all the surrounding circumstances," as said by the court in the *Mathieson Alkali case, supra*, l. c. 801-2, and when so viewed we submit that Mr. Baty's action was justified in every way and constituted no interference with the employees in their choice of a union.

The cases cited by the Board at page 51, footnote 13, all involved situations wholly different from the situation here, and hence are not applicable.

B-11.

The Board's Findings and Conclusions That Sylvia Hull Was Laid Off by Respondent Because of Her Union Activities and That the Respondent Thereby Interfered with the Rights of Its Employees Are Not Supported by the Evidence.

The Board found that Sylvia Hull was temporarily laid off by respondent because of her union activities but found that respondent did not refuse to reinstate her (X, 3890).

The only point involved with reference to Sylvia Hull therefore is whether the respondent's action constituted an interference with the rights of employees in the free selection of bargaining representatives. We submit that such an inference under the state of facts disclosed is farfetched and unwarranted. In the first place, she *volunteered* to go home after the demonstration of employees. The testimony of Mrs. Hyde was (II, 536) that the girls said they would return to work as soon as they heard Sylvia say she was going to go home, at which time Sylvia did say "I will go home. I didn't know the girls felt this way about it, or I wouldn't have done it."

In the second place, her lay off, if it be deemed a lay off (which we deny), was only for a day and the following day respondent tried to call her back to the plant. That counteracted any adverse inference that might have been drawn because of her leaving (or lay off).

In the next place, the evidence clearly shows that the employees' attitude against Sylvia Hull and the ILGWU was already fixed prior to her leaving.

The article in the paper and Sylvia Hull's conduct at the plant were planned by the ILGWU as a part of its conspiracy. The primary responsibility for the acts of the employees, therefore, rests upon Meyer Perlstein and Sylvia Hull, who caused the false notice to appear. Nothing that Respondent did, or failed to do, added one whit

to the employees' feelings or action with respect to the ILGWU. It is wholly unrealistic and unjust to attempt to pin on Respondent the responsibility for something that rests first on Perlstein and Hull and secondly on the employees themselves.

As was said by the Court in *NLRB* v. *Asheville Hosiery Co.*, (C. C. A. 4) 108 F. 2d 288, l. c. 291-292:

> "Evidence of the most convincing kind shows that the misrepresentations and threats above referred to had stirred up violent resentment on the part of a majority of the workers against those who favored the Union. * * *
>
> "There is no substantial ground for the rejection of the overwhelming evidence that the hostile attitude of the great majority of the workers toward the Union proceeded from their sincere and spontaneous dislike of outside interference; and it is not enough to say that the management shared this feeling and manifested it in the statements of its supervisory officials."

B-12.

The Board's Findings and Conclusions As to Coercion and Interference, Based on Respondent's Alleged Hostility Toward ILGWU Are Not Supported by the Evidence.

The respondent's alleged "hostility" toward the ILGWU has been purely *defensive, directed not against employees' membership in the ILGWU, but* to prevent violence at the plant and the *unlawful secondary boycott* which the ILGWU was conducting—the existence of which has been definitely found by three Federal Judges. See Mrs. Reed's testimony, VII, 2073-4, 2090, 2148-9.

The Board rejected much of Respondent's evidence relating to the alleged 1934-35 activities on which the Board bases its findings of hostilities. This has been

discussed in Part One of our brief, under point I (3). Even so, we submit that the evidence does not support the Board's prejudicial findings that because of respondent's alleged "hostility" toward the ILGWU, the employees have been coerced or interfered with in their free choice of a labor union.

B-13.

The Board's Findings and Order As to Refund of Checked-Off Dues, Are Contrary to the Evidence and the Law.

The Board's finding that "the company agreed, at the request of the DGWU, to a check-off * * *" (X, 3880), is absolutely unsupported by the evidence.

The undisputed testimony shows that Respondent refused the DGWU's request for a check-off (R. I, 226-7, 131-2). Later employees *individually* requested in writing that respondent deduct from their pay their respective union dues. Respondent complied with the said *individual* requests (R. 277). No monies have ever been deducted from an employee's pay without the express authorization of said employee. Respondent has no agreement with the DGWU nor has it ever had with respect to a check-off (I, 132).

The Board's finding is thus in the teeth of the evidence, and is a typical example of the warping and distortion of the evidence in the Board's findings.

The Board's order of reimbursement of checked-off dues, *under the circumstances here shown*, is contrary to law, first, because the DGWU was not a company-dominated union, and secondly, because the employes individually and without any compulsion asked the company to check off their dues.

The present state of the law on this subject appears to be as follows:

In *Virginia Electric and Power Co.* v. *NLRB*, 319 U. S. 533, the court in footnote 1 states that five of the Circuit Courts of Appeal have refused to enforce reimbursement of check-off dues. This Court in the Virginia Electric case enforced the order of reimbursement but in doing so expressly stated that it was deciding "only the case before us," and sustained the order of reimbursement "under the circumstances here disclosed" (l. c. 545).

There was a dissenting opinion by Mr. Justice Roberts in which the Chief Justice and Mr. Justice Jackson joined. Mr. Justice Frankfurter, in concurring with the majority, stated that

> "if the controlling facts in this case were like those in *Western Union Tel. Co.* v. *NLRB*, (C. C. A. 2) 113 F. 2d 992, I too would accept the reasoning of Judge Learned Hand's opinion in that case and join my brother Roberts. But the vital difference between the Western Union and this case is that in the former 'there was no evidence that all those (employees) who asked to have their wages stopped, did so in any part because they were coerced.' *Id.*, 997. Here the employees had no such choice; they could avoid the check-off of union dues only by giving up their jobs" (l. c. 545).

In the majority opinion the Court stated the basis for sustaining the order for reimbursement as follows:

> "The result was that the employees, *under the I. O. E. by-laws had to authorize* wage deductions for dues to remain members of the I. O. E. and they had to remain members to retain their jobs" (l. c. 540).

No such situation exists in the case at bar. If any member did not want his dues checked-off by the company, all he had to do was to say so. He could not be expelled from the union or lose his job for taking such

position. In fact there was no penalty or coercion of *any* kind—it was purely a personal matter with each employee whether he paid his dues direct to the union or had the company deduct it and pay the union. Like any other such authority, the direction to check-off the dues may be revoked by any or all employees at any time, without

As the respondent did not seek the check-off, there is no basis to assume that respondent sought by such means to control the DGWU. For that reason and under all the circumstances existing here, the Board's order for reimbursement of dues is not remedial but is punitive and goes beyond the purpose of the Act or the power of the Board (*NLRB* v. *Express Publishing Co.*, 312 U. S. 426, l. c. 437).

The facts in the case at bar take it out of the holding in the *Virginia Electric Power* case, and bring it within the exception therein referred to by Mr. Justice Frankfurter and within the rulings in the *Western Union* case and other similar cases denying reimbursement.

B-14.

The Board's Findings, Conclusions and Order Are Contrary to the Authorities.

Numerous cases hold that circumstances similar to, but stronger than, those relied on by the Board in the case at bar were insufficient to support the Board's findings and conclusions:

NLRB v. *Clinton Woolen Mfg. Co.*, 141 F. 2d 753; *NLRB* v. *J. L. Brandeis & Sons*, 145 F. 2d 556; *Commonwealth Edison Co.* v. *NLRB*, 135 F. 2d 891; *NLRB* v. *Sun Shipbuilding and Dry Dock Co.*, 135 F. 2d 15; *NLRB* v. *Union Mfg. Co.*, 124 F. 2d 332, 333; *NLRB* v. *Sparks-Withington Co.*, 119 F. 2d 78; *NLRB* v. *Riverside Mfg. Co.*, 119 F. 2d 302; *Diamond-T Motor Co.* v. *NLRB*, 119 F. 2d 978; *Quaker State Oil Ref. Corp.* v. *NLRB*, 119 F. 2d 631; *NLRB*

v. *Appalachian Electric Power Co.*, 140 F. 2d 217; *Boeing Airplane Co.* v. *NLRB*, 140 F. 2d 423; *NLRB* v. *Brown-Brockmeyer Co.*, 143 F. 2d 537; *Schweitzer, Inc.*, v. *NLRB*, (C. C. A., District of Columbia) 144 F. 2d 520.

CONCLUSION.

The employees here had the union of their unanimous choice; the employer had complied with the Act and bargained with the representatives selected by the employees. Harmonious labor relations existed and interstate commerce was not impeded. This court, like the court below, should uphold the rights of employees to have the union of their choice, and should protect the employer who seeks to comply with the provisions of the Act and the holdings of this court, by dealing only with the representatives selected by a majority of its employees.

Respondent respectfully submits that the judgment below should be affirmed or the petitions for certiorari dismissed.

Respectfully submitted,

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